Form No. 7

San Francisco Law Library

No. 77576

Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

No. 4023

United States Circuit Court of Appeals

For the Ninth Circuit.

JOHN G. MORAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

JOSEPH BRUNO and W. E. SMITH,

Defendants.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN G. MORAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

JOSEPH BRUNO and W. E. SMITH,

Defendants.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiff in Error:

FRED H. THOMPSON, Esq., Pacific Finance Building, Los Angeles, California.

For Defendant in Error:

SAMUEL McNABB, Esq., United States Attorney; J. EDWIN SIMPSON, Assistant United States Attorney, Federal Building, Los Angeles, California.

United States of America, ss.

To The United States of America Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of July, A. D. 1925, pursuant to a Writ of Error in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action wherein the United States of America is Plaintiff vs Joseph Bruno, John G. Moran and et al are defendants and you are to show cause, if any there be, why the judgment made, rendered and entered *in* the 7th day of March 1925 in the said action mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick United States District Judge for the Southern District of California, this 9th day of June, A. D. 1925, and of the Independence of the United States, the one hundred and forty-*nine*

Paul J. McCormick
U. S. District Judge for the Southern
District of California.

[Endorsed]: FILED JUN 9 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk. Received copy of the within Citation this 9th day of June 1925 J. Edwin Simpson Asst U S Atty.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between The United States of America, Plaintiff, vs. Joseph Bruno, John G. Moran and et al, Defendants a manifest error hath happened, to the great damage of the said John G. Moran as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 9th day of July next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. William H. Taft, Chief Justice of the United States, this 9th day of June in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the United States the one hundred and forty-nineth.

(SEAL) Chas. N. Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

McCormick

Judge.

I hereby certify that a copy of the within Writ of Error was on the 9th day of June, 1925, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas. N. Williams

Clerk of the District Court of the United States for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

[Endorsed]: Filed June 9-1925 Chas N Williams, Clerk R S Zimmerman Deputy

(TITLE OF COURT AND CAUSE)

COMPLAINT

THE UNITED STATES OF AMERICA through its attorneys Joseph C. Burke, United States Attorney

for the Southern District of California, and J. E. Simpson, Assistant United States Attorney for the said District, complains of the defendants and for cause of action alleges:

I.

That on or about the 5th day of July, 1923, in the City of Los Angeles, State of California, under an order and warrant of arrest duly made and issued by Stephen G. Long, the United States Commissioner, in the City of Los Angeles, State of California, one Joseph Bruno was arrested by the Marshal for the Southern District of California, on a charge of mailing narcotics in the United States Mail;

II.

That under and by virtue of an affidavit of complaint filed in said Court charging the said defendant Joseph Bruno for commission of the aforesaid offense, to-wit: a violation of Section 217 of the Federal Penal Code, the defendant Joseph Bruno was brought before Stephen G. Long, the aforesaid United States Commissioner, and was duly admitted to bail in the sum of TEN THOUSAND DOLLARS ($10,000), pending examination on the said charge;

III.

That on the 6th day of July, 1923, these defendants and each of them, Joseph Bruno, John G. Moran and W. E. Smith undertook in the sum of TEN THOUSAND DOLLARS ($10,000) that the said Joseph Bruno should, if released from the custody of the said Marshal, appear and answer said charge or any matter or thing that may be objected against him wherever

and whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and processes of the said Court during the pendency of said action, and render himself in execution of such judgment as might be issued and entered against him, a copy of which undertaking or bail bond is hereto annexed marked Exhibit "A", and the whole thereof is made a part hereof the same as if the same were specifically set forth herein;

IV.

That thereupon and in consideration of the said undertaking executed by these defendants, the said Joseph Bruno was released from custody of the United States Marshal and into the custody of the defendants John G. Moran and W. E. Smith;

V.

That thereafter and after proceedings had and upon notice to these defendants John G. Moran and W. E. Smith, the said cause was set down for hearing on the 13th day of November, 1923, that on the said date the said Joseph Bruno, defendant in said action, failed to appear before the said Commissioner and the sureties on said bail bond, John G. Moran and W. E. Smith, were called to produce the said Joseph Bruno but they failed to produce him; whereupon the said Commissioner declared said bond to be forfeited.

VI.

That by reason of the matters herein before set forth the condition of the said bond to appear, attached hereto and marked Exhibit "A", has been broken and

the said defendants and each of them are indebted to this plaintiff in the sum of TEN THOUSAND DOLLARS ($10,000);

VII.

That the said sum has not nor has any part thereof been paid and the whole thereof is now due, owing and unpaid to this plaintiff.

WHEREFORE, plaintiff prays judgement against these defendants and each of them.

(1) For judgment in the sum of TEN THOUSAND DOLLARS ($10,000) with interest thereon from the 13th day of November, 1923, until paid.

(2) For its costs of suit incurred herein.

(3) For a Writ of Attachment directing the Marshal for the Southern District of California to attach any and all property of the defendants found within this District.

(4) For such other and further relief as to this Court may seem just and proper in the premises.

JOSEPH C. BURKE,
United States Attorney,
J. E. Simpson
J. E. Simpson,
Assistant United States Attorney.
United States of America

Exhibit "A"

Southern District of California, ss.

KNOW ALL MEN BY THESE PRESENTS:

That we Joseph Bruno as principal, and John G. Moran and W. E. Smith as sureties, are held and

firmly bound unto the United States of America, in the sum of Ten Thousand Dollars, to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our executors and administrators, firmly by these presents. Witness our hands and seals at Los Angeles, in said District, this 6th day of July A. D. 1923

The conditions of the above obligation is such that, whereas, an affidavit of complaint on oath hath been duly made to Stephen G. Long a United States Commissioner for said District, charging Joseph Bruno with the crime of violation of Section 217 Federal Penal Code committed on or about the 27th day of June 1923, to-wit: in the Los Angeles Calif District aforesaid, and, whereas, the said Joseph Bruno has been arrested by virtue of a warrant duly issued on said affidavit of complaint, and pending examination has been duly admitted to bail in the sum of Ten Thousand Dollars

NOW, THEREFORE, if the said Joseph Bruno shall appear and answer said charge or any matter or thing that may be objected against him wherever and whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and if convicted, shall appear for judgment and render himself in execution thereof, then shall this *rcognizance* be void, otherwise to remain in full effect and virtue.

(Defendant) Joseph Bruno [SEAL]
Street 316 Clay St
City Los Angeles
(Surety) John G. Moran
(Surety) W. E. Smith [SEAL]

Southern District of California, ss.

John G. Moran and W. E. Smith being duly sworn, each for himself deposes and says, that he is a householder in said District, and is worth the sum of Ten Thousand Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities, and that he is the owner of the property mentioned in his schedule of assets hereunder.

(A) John G. Moran
Address 743 Beacon Ave. City

(B) W. E. Smith
Address 1126 W 7th St. City

Subscribed and sworn to before me this 6th *July* day of July 1923

Stephen G. Long
United States Commissioner, for the Southern District of California.

Schedule of Assets of Surety
Schedule "A"

s. 1/2 and N. E. 4 of Sect 16= Township 30-So. Range - 3 East. M-D-M= 480 acres, San Louis Obispo Co. Calif value 24,000.00 clear

Schedule of Assets of Surety
Schedule "B"

East 80 acres Tract 85, township 14 South Range 15 East. S-B-M Co of Imperial Calif Value $16,-000.00 clear.

Examined and recommended for approval as provided in Rule 29.

A. E. T. Chapman
Attorney

Main - 87 -

FILED NOV 22 1923 CHAS. N. WILLIAMS, Clerk G. F. Gibson, Deputy

(Endorsed): 5993 Cr No. 3807 U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA, Before United States Commissioner The United States of America vs. Joseph Bruno Bond to Appear I hereby approve the form of the within bond and the sufficiency of the securities thereon. Stephen G. Long Filed this 6 day of Jul A. D. 1923 Stephen G. Long United States Commissioner

[Endorsed]: FILED APR 1 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

(TITLE OF COURT AND CAUSE)

Demurrer

Comes now the defendant, John G. Moran, appearing for himself and not for his co-defendants, demurrs to the Complaint on file herein on the grounds:

I

That the Complaint does not state facts sufficient to constitute a Cause of Action.

II

That the Complaint does not state facts sufficient to constitute a Cause of Action for the reason that the bond upon which the action is predicated is not in manner and form as required by law, and is without legal efficacy.

III

The Complaint is ambiguous, uncertain and unintelligible for the reason that it cannot be ascertained from either the Complaint or the bond for what offense, if any, the bond is given.

IV

The Complaint is ambiguous and uncertain for the reason that it does not appear from said Complaint that the defendant was *arranged* in a Court on any criminal charge.

V

The Complaint is ambiguous and uncertain for the reason that it cannot be ascertained therefrom when the defendant was *arranged* on a criminal charge or how or when he had notice that case was set down for hearing on the 13th day of November, 1923.

VI

The Complaint is ambiguous and uncertain for the reason that it does not appear from said Complaint that the defendant was notified of the date that the case was set down for hearing.

VII

The Complaint is ambiguous and uncertain in this that it cannot be ascertained from said Complaint when the bail bond was declared forfeited or who declared it forfeited.

VIII

The Complaint is ambiguous and uncertain in this that it cannot be ascertained from said Complaint when the case against the defendant was called for hearing on the 13th day of November, 1923.

IX

The Complaint is ambiguous and uncertain in this that it cannot be ascertained from said Complaint or bond, the place or Court where the defendant was to appear to answer the accusation.

X

The Complaint is ambiguous and uncertain and the bond is invalid for the reason it does not specify a time for the defendant to appear.

XI

The Complaint is ambiguous and uncertain for the reason that it cannot be ascertained from the said Complaint or bond, what part or portion of Section 217 of the Federal Criminal *Court* the defendant was accused of violating.

XII

The Complaint is ambiguous and uncertain for the reason that it does not appear from said Complaint that the bail bond was on file in any Court or that it was a public document when the bail bond was declared forfeited.

XIII

The Complaint is ambiguous and uncertain in this that it cannot be ascertained from said Comp*al*int whether or not the charge against the defendant was called for hearing on the 13th day of November, 1923.

XIV

The Complaint is ambiguous and uncertain in this that it cannot be ascertained from said Complaint or bond, the place where the defendant was to appear and answer to the accusation.

XV

The Complaint is ambiguous and uncertain for the reason the bond does not specify a time for the defendant to appear.

WHEREFORE: defendant John G. Moran prays that his demurrer be sustained.

Fred H. Thompson

Attorney for defendant John G. Moran.

[Endorsed]: Received copy of the within this 31st day of May, 1924. W. T. Hutchins, for U S atty. FILED MAY 31 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk.

At a stated term, to wit: The January A. D. 1924 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the ninth day of June, in the year of Our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable Paul J. McCormick, District Judge.

United States of America, Plaintiff, vs. John G. Moran; Joseph Bruno & W. E. Smith Defendants.	No. 1672-M. Civ.

This cause coming before the court at this time for hearing on demurrer; J. E. Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government, it is by the court ordered that this matter be submitted on briefs; said briefs to be filed 10 x 5 x 5 days.

At a stated term, to wit: The July A. D. 1924 Term, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the thirteenth day of October, in the year of Our Lord one thousand nine hundred and twenty-four.

Present: The Honorable Paul J. McCormick, District Judge.

United States of America, Plaintiff, vs. Joseph Bruno, John G. Moran and W. E. Smith, Defendants.	No. 1672 Civ.

The demurrer of the defendant John G. Moran is overruled and defendant is hereby given ten days within which to answer herein.

(TITLE OF COURT AND CAUSE)

ANSWER
of
JOHN G. MORAN.

I.

John G. Moran answering the complaint of the plaintiff herein denies each and every allegation in said complaint.

II.

The defendant further answering plaintiff's complaint alleges that the Court has no jurisdiction of said supposed cause of action set forth in the complaint for the reason that the purported bond upon which the action is predicated was not filed with the Clerk of this Court on the 13th. day of November, 1923, the date which it is alleged the bond was forfeited.

III.

The defendant, John G. Moran, further answering the complaint alleges that the Court is without jurisdiction of said supposed cause of action for the reason that the purported bond upon which the action is predicated is without legal efficacy. In this, that the bond does not set out briefly or at all the nature of the offenses or crime purported to be charged.

IV.

The defendant, John G .Moran, further answering the complaint alleges that the Court has no jurisdiction to try said cause for the reason that the purported bail bond upon which the action is predicated was not by the Commissioner on the 13th. day of November, 1923, or any other date, or ever, or at all, declared forfeited in manner and form as required by law, and that said bond is not now and never has been forfeited.

V.

The defendant, John G. Moran, further answering plaintiff's complaint, and for a separate and distinct cause of action, defendant denies, alleges and admits as follows, to-wit: Admits that the defendant, Joseph

Bruno, was arrested on the 5th. day of July, 1923 in the City of Los Angeles, State of California. Admits that the defendant, Joseph Bruno was brought before Stephen G. Long, United States Commissioner in and for the Southern District of California on some criminal charge. Admits that the defendant, Joseph Bruno, was admitted to bail in the sum of TEN THOUSAND DOLLARS ($10,000) pending his examination on the said charge. Defendant admits that he signed the purported bail bond which is annexed to plaintiff's complaint, marked "Exhibit A". Admits that Joseph Bruno was released from the custody of the United States Marshall. Defendant alleges the fact to be: That Joseph Bruno was arraigned on the complaint filed in said action. That his examination on said complaint was set for hearing on July 31, 1923. Defendant Moran alleges the fact to be: That Joseph Bruno on the said 31st. day of July, 1923, was in Court at the hour set for his examination, and ready for his trial. That said cause was continued until September the 4th., 1923. Defendant Moran further alleges the fact to be: That Joseph Bruno on said September 4, 1923 was in Court at the hour set for his trial, and ready to proceed with the examination of said cause. That said cause was continued without the knowlecge and consent of the defendant and surities to September 20, 1923. That on the 20th. day of September, 1923 the defendant was in Court at the hour set for his trial, and was ready to proceed with the examination of said cause. That over the objection of the said surities, the defendants, Moran and Smith, the said

cause was continued to September 27, 1923. That on the 27th. day of September, 1923 as defendant Moran is informed and believes, and therefore alleges the fact to be: The defendant, Bruno, went to the Court room of the United States Commissioner in the Federal Building at Los Angeles, California at the hour and time set for his trial. That the United States Commissioner was not present to hear said cause, nor was any member of the United States District Attorney's office present to proceed with the prosecution of said cause. That said cause was not called for hearing on said day at the time set for the hearing, nor was said cause called for hearing on said day at all. Defendant Moran, further on information and belief, alleges the fact to be: That said Court room was being used by some person other than Stephen G. Long, the said United States Commissioner, for purpose other than the business of said United States Commissioner. The defendant, Moran, has been informed and believes and therefore alleges the fact to be: That thereafter the defendant, Joseph Bruno, was not notified by the United States Commissioner, or any other officers, or agents of the plaintiff herein, to appear before said United States Commissioner for his trial on said cause on the said 13th. day of November, 1923. And that the said Joseph Bruno had no knowledge or information that his trial before the United States Commissioner was set for November 13, 1923.

VI.

The defendant, John G. Moran, further answering the complaint on file herein, denies that Joseph Bruno

was by the United States of America, or its officers, or agents, or any other person or persons notified that his trial on said cause was set for November 13, 1923.

VII.

Defendant, John G. Moran, further answering paragraph five of plaintiff's complaint, denies that the defendant, John G. Moran and W. E. Smith, had notice from the United States of America, or any of its officers, or agents, or any person or persons whatsoever, or at all, that the said cause was set for hearing on the 13th. day of November, 1923.

VIII.

Defendant Moran further answering complaint on file herein, denies that the said United States Commissioner did on the said 13th. day of November, 1923 call upon the defendant, John G. Moran and W. E. Smith, to produce said Joseph Bruno in Court prior to the forfeiting of the said bail.

IX.

Defendant, for a further, and separate, and distinct cause of defense, denies and admits and alleges as follows, to-wit: Admits the execution of the purported bail bond set out in plaintiff's complaint, and alleges the fact to be: That the defendant, Joseph Bruno, was at all times, from and after July 31, 1923 up to and including September 27, 1923, ready and willing to proceed with his examination on the charge set out in this action, and that he was all of the said time within the jurisdiction of the said United States Commissioner.

The defendant, John G. Moran further alleges that he has been informed and believes, and upon such information and belief alleges the fact to be: The defendant, Joseph Bruno, was on the 27th. day of September, 1923, at the hour and time set for his examination on said cause, in the Court room of the said United States Commissioner ready for his examination and trial on the said cause. That said cause was again continued at the request of the United States of America.

That subsequent to the said 27th. day of September, 1923, the exact date to defendant Moran being unknown, the said Joseph Bruno was, with the full knowledge and consent of the plaintiff herein, its officers and agents, confined by the State of California in a lunatic asylum in the County of San Bernardino, State of California, which said lunatic asylum is known and designated as The Southern California State Hospital for the Insane.

That said Bruno had been thither carried and there confined under medical treatment for the cure of his malady by the officers and agents of the State of California, with the full knowledge and consent of Stephen G. Long, the said United States Commissioner, and with the full knowledge and consent of the plaintiff herein. And that as affiant is informed and believes, and therefore alleges the fact to be: The said Joseph Bruno was so confined in said asylum on the said 13th. day of November, 1923. Defendant, John Moran, further alleges the fact to be: That said Bruno was

by law and by the rules and regulations of said asylum imprisoned beyond the control of the defendants.

That the defendant, Moran, alleges the fact to be: That prior to November 13, 1923 the defendant, Moran, demanded of the United States Marshall of the Southern District of Southern California, and other agents and officers of the plaintiff herein, to go with him to the said asylum and take the said Bruno and bring him before the said United States Commissioner. That the defendant offered to furnish an automibile and pay the expenses of the said officers if they would go with him to the said asylum and take possession of the body of the said Bruno. That the said United States Marshall refused so to do.

That subsequent to the 13th. day of November, 1923 as affiant is informed and believes, and therefore alleges the fact to be: The said Joseph Bruno escaped from said institution, and so defendant John G. Moran, says that he is not responsible upon or for the forfeiting of said bail bond.

For a separate and distinct cause of defense, defendant Moran denies, alleges and admits as follows, to-wit: Denies that the defendant, John G. Moran and W. E. Smith or either of them was on the 13th. day of November, 1923, or any other time prior thereto called upon by the United States Commissioner to produce the body of the defendant, Joseph Bruno in Court on the said 13th. day of November, 1923.

WHEREFORE, the defendant, John G. Moran prays judgment:

(1) That the plaintiff take nothing by this action, and that he be dismissed with his costs.

(2) And for such other and further relief as to the Court may seem proper in the premises.

Fred H. Thompson,

Attorney for the Defendant, John G. Moran.

[Endorsed]: Received copy of the within Answer the 23rd day of Oct. 1924. Joseph C. Burke, U. S. Atty., Russell Graham, Asst., J. E. Simpson Asst. FILED OCT 23 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

At a stated term, to wit: The January A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the seventeenth day of February, in the year of Our Lord one thousand nine hundred and twenty-five.

Present: The Honorable Paul J. McCormick, District Judge.

United States of America, Plaintiff,	
vs.	No. 1672-M. Civ.
Joseph Bruno, et al., Defendants.	

This cause coming before the court for trial; J. E. Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; and there being no appearance for the defendants, it is ordered

by the court that the plaintiff put on its proof, and Stephen G. Long having been called and sworn and having testified in behalf of the Government, it is by the court ordered that the plaintiff have judgment as prayed for, and that the plaintiff prepare findings.

(TITLE OF COURT AND CAUSE)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly to be heard upon the 17th day of February, 1925 after having been regularly [P J M. J]
^set for trial on the said date on the calling of the January term trial calendar, and the plaintiff having been represented in court by J. E. Simpson, Assistant United States Attorney, and the defendant John G. Moran, not being present in court, either in person or by counsel, and evidence having been introduced on behalf of the plaintiff in support of the allegations contained in its complaint, and no evidence having been introduced by the defendant, and the court having directed that the findings and judgment be in favor of the plaintiff,

NOW, THEREFORE, after due deliberation, the court finds the following facts:

I.

That each and all of the allegations contained in the complaint filed by the plaintiff herein are true;

II.

That it is not true, as alleged in the defendant's answer, that the defendant Joseph Bruno and the de-

fendants John G. Moran and W. E. Smith were not notified that the cause was set for trial by the United States Commissioner on November 13th, 1923; but the court finds that on July 6, 1923, upon the arraignment of the defendant Joseph Bruno, and the execution of the bond by these defendants, the *the* court, in the presence of the defendants continued the preliminary of the defendant Joseph Bruno until July 31st, which said continuance was with the express consent of the defendants; That upon July 31st, the hearing was, in the presence of the defendant continued to September 4th at the request of the plaintiff and defendant Joseph Bruno; that on September 4th, 1923, the cause was continued with the consent of both parties and set for hearing on September 20th, 1923; that on September 20th, 1923 the cause was in like manner continued to September 27th, 1923; that on September 27th, the cause was in like manner continued until October 11th, 1923; that on October 11th, 1923, the cause was continued to October 22nd, 1923 for hearing, at the request of the bondsmen John G. Moran and W. E. Smith, upon the statement by them that the defendant Joseph Bruno was ill in a hospital; that on October 22, 1923, the cause was continued for hearing to October 29th, 1923, at the request of Arthur Chapman, attorney for the defendant; that on October 29th, 1923, the cause was continued one week, the attorney for the defendant being present, but the defendant Joseph Bruno being absent; that thereafter the cause was in like manner continued until November 13th, 1923, at which said time the defendant Joseph

Bruno was called by the Marshal and the defendants John G. Moran and W. E. Smith were by the Marshal called to produce the body of the said Joseph Bruno; that the defendants failed to appear and it was by the Commissioner ordered that his bond be forfeited.

CONCLUSIONS OF LAW.

From the foregoing facts, the court legally concludes:

1. That the plaintiff United States of America is entitled to a judgment against the defendant John G. Moran in the sum of Ten Thousand Dollars ($10,000.00), and to its costs of suit incurred or expended herein, and to have execution issued therefor;

2. That a judgment be entered accordingly.

Dated, February 19th, 1925.

Paul J. McCormick,
United States District Judge.

[Endorsed]: Filed February 19, 1925 Chas. N. Williams, Clerk By Louis J. Somers, Deputy.

(TITLE OF COURT AND CAUSE)

JUDGMENT.

On the 17th. day of February, A. D., 1925, being a day in the January, 1925 Term of the above-entitled Court, this cause came on for trial; J. E. Simpson, Esq. Assistant U. S. Attorney, appearing as counsel for the Government; and there being no appearance for the defendants, and the Court having ordered that plaintiff adduce its proof, and evidence on behalf of

the Government having thereupon been adduced, and the Court having ordered that the Plaintiff have judgment as prayed for in the Complaint, and that the Plaintiff prepare Findings; and thereafter, on February 19th., 1925, Findings of Fact and Conclusions of Law were filed herein, wherein the Court finds for the Plaintiff, and the United States of America in the sum of $10,000.00, and against the defendant John G. Moran, and for its costs incurred herein, and that execution issue therefor, and that judgment accordingly enter;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the Plaintiff, the United States of America, do have and recover of and from the defendant, John G. Moran the sum of Ten Thousand (10,000.00) Dollars, together with costs incurred herein and that execution issue therefor.

JUDGMENT ENTERED MARCH 9th., 1925

CHAS. N. WILLIAMS, Clerk

By Murray E. Wire

Deputy Clerk.

[Endorsed]: FILED MAR 9 1925 CHAS. N. WILLIAMS, Clerk By Murray E. Wire, Deputy

(TITLE OF COURT AND CAUSE)

Assignment of Error

And now comes the plaintiff in error by his attorney, and in connection with his petition for a writ of error says that in the record, proceedings and in the final

judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The Court erred in not sustaining the demurrer of the plaintiff in error and the defendant below to the complaint.

2. The Court erred in holding good in law the bail bond upon which the action is predicated.

3. The judgment of the Court is by the reason thereof contrary to law, by reason whereof plaintiff in error prays that the judgment aforesaid may be reversed etc.

Fred H. Thompson
Attorney for Plaintiff in Error

[Endorsed]: FILED JUN 5 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

(TITLE OF COURT AND CAUSE)

Petition for Writ of Error

To the Honorable Paul J. McCormick
Judge of said court.

And now comes John G. Moran, defendant in the above entitled action, and for himself, and not for his co-defendants, by and through his attorney Fred H. Thompson, and feeling himself aggrieved by the final judgment of this court entered against him in favor of the United States of America, the Plaintiff herein on the 9th day of March 1925 hereby prays that a Writ of Error may be allowed to him from the United States Circuit Court of Appeals for the Ninth Circuit

to the District Court of the United States in and for the Southern District of California, Southern Division, and in connection with this petition, petitioner herewith presents his Assignment of Error.

Fred H. Thompson
Attorney for Plaintiff in Error

[Endorsed]: FILED JUN 5 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

(TITLE OF COURT AND CAUSE)

Order Allowing a Writ of Error and Fixing Bond for Costs.

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Southern District of California, Southern Division, as prayed for in the petition of the said John G. Moran, and let a Citation be issued to the defendant in error.

It is further ordered that an appeal bond for costs be fixed in the sum of $300/00

Paul J. McCormick
Judge.

[Endorsed]: FILED JUN 5 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

(TITLE OF COURT AND CAUSE)

BOND

KNOW ALL MEN BY THESE PRESENTS: That we, John G. Moran, Principal and E. W. Pascoe, and A. A. Byrens, sureties, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred ($300.00) Dollars, to be paid the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

WHEREAS lately at a term of the District Court of the United States in and for the Southern District of California, Southern Division, in a suit pending in said Court between the United States of America, plaintiff vs. John G. Moran, et al, defendants, and

WHEREAS, a judgment by said Court on the 7th day of March, 1925, was rendered against the said defendants John G. Moran et al, and the said defendant, John G. Moran, having obtained a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit in the aforesaid suit;

NOW, the condition of the above application is such that the said John G. Moran shall prosecute his Appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

Sealed with our seal and dated this 8th day of June, in the year of our Lord, 1925.

John G. Moran
Principal

E. W. Pascoe
A. A. Byrens
Sureties.

State of California)
(SS.
County of Los Angeles)

E. W. PASCOE, being first duly sworn, deposes and says; that his occupation is investments, and that he is a resident of the City of Los Angeles, County of Los Angeles, State of California, and that he is worth the sum of Three Hundred ($300.00) Dollars over and above his just debts and liabilities exclusive of property exempt from execution, and that he is a property holder within the County of Los Angeles, State of California.

E. W. Pascoe

SUBSCRIBED AND SWORN to before me this 8th day of June, 1925.
Esther Hattenbach
Notary Public in and for the County of Los Angeles State of California
(SEAL)

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

A. A. Byrens, being first duly sworn, deposes and says: that his occupation is investments and that he is a resident of the City of Los Angeles, County of Los Angeles, State of California; and that he is worth the sum of Three Hundred ($300) Dollars over and above

his just debts and liabilities exclusive of property exempt from execution; and that he is a property holder within the County of Los Angeles, State of California.

A. A. Byrens

Subscribed and sworn to before me this
8th day of June, 1925.
Anna May Kelly
Notary Public in and for the County of
Los Angeles, State of California
My Com. expires Oct. 15, 1927.
(SEAL)

I hereby certify that I am personally acquainted with the above named sureties and believe them to be worth the sum of Three Hundred ($300.00) Dollars as set forth, and I hereby recommend to the Court the approval of the said Bond.

Fred H. Thompson
Attorney for Defendant.

Approved this 10th day of June, 1925.

McCormick
Judge.

[Endorsed]: FILED JUN 9 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

(TITLE OF COURT AND CAUSE)

PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue certified transcript on writ of error to the Circuit Court of Appeals for the Ninth Circuit to include copy of the complaint, demurrer, court minutes of June 9th, 1924, and October 13th, 1924, answer of defendant, minute order of February 17 1925, findings of fact and judgment, assignment of error, petition for writ of error, order allowing writ of error, bond on writ of error, citation and writ of error, omitting captions and endorsements with the exception of filing marks.

Attorney for defendant
Fred H. Thompson.

[Endorsed]: FILED JUN 9 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

United States of America, Plaintiff,	
vs.	CLERK'S
Joseph Bruno, *et al.*, Defendants.	CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 31 pages, numbered from 1 to 31 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, complaint, demurrer, minutes of June 9, 1924, order overruling demurrer, answer, minute order of February 17th, 1925, findings of fact and conclusions of law, judgment, assignment of errors, petition for writ of error, order allowing writ of error and fixing bond for costs, bond, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff-in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4026

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Defendant in Error,
JOHN G. MORAN and Etal,
Plaintiff in Error.

Opening Brief of Plaintiff in Error

FRED THOMPSON,
704 Finance Bldg.,
Los Angeles, Calif.,
Attorney for Plaintiff in Error.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Defendant in Error,*	
JOHN G. MORAN and Etal, *Plaintiff in Error.*	

OPENING BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

This is an acting by the United States Government to recover on a bail bond.

The defendant and plaintiff in Error demurred to the complaint and contended that the bail bond upon which the action is predicated is not good in law.

The court over-ruled the demurrer and held the bail bond good in law.

The plaintiff in error is before this court on a writ of error upon the questions presented.

ASSIGNMENT OF ERROR.

1. The Court erred in not sustaining the demurrer of the plaintiff in error and the defendant below to the complaint.

2. The Court erred in holding good in law the bail bond upon which the action is predicated.

3. The judgment of the Court is by the reason thereof contrary to law, by reason whereof plaintiff in error prays that the judgment aforesaid may be reversed, etc.

THE BOND IS INVALID, WITHOUT LEGAL EFFICACY, AND IS NOT GOOD IN LAW.

I. For the reason that it does not substantially conform to the requirements of the laws of the State of California.

II. For the reason that it does not state briefly the nature of the offense charged.

III. For the reason that the bond contains no promise on the part of the sureties that if accused fails to perform the conditions nominated in the bond that they will pay to the United States Government the sum in which the accused is admitted to bail.

IV. For the reason that it does not designate the time or Court in which the accused is to appear.

V. For the reason that the bond was not on file and was not a record when the bond was declared forfeited.

I.

THE BOND IS INVALID FOR THE REASON IT DOES NOT STATE BRIEFLY THE NATURE OF THE OFFENSE.

United States v. Dunbar 83 Fed. Rep. 153

This Court at Pg. 154 construing Sec. 1014 of Rev. St. of the United States said:

> "The purpose and effect of the use of congress of the words in the foregoing provision 'agreeable to the usual mode of process against offender in such State' was to assimulate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for a similar purpose by the laws of the State where the proceedings take place."
>
> "The real question, therefore, is whether the recognizance sued on are valid when tested by the requirements of the Oregon Statute in regard to bail."

The question is therefore settled at least so far as this district is concerned.

THAT THE VALIDITY OF BAIL BOND IN A UNITED STATES COURT IS TESTED BY THE REQUIREMENTS OF THE STATUTES OF THE STATE WHERE SUCH UNITED STATES COURT IS LOCATED.

We quote Sec. 1278 of the California Penal Code:

> "An order having been made on the ..... day of ....., A. D. eighteen (nineteen) ....., by A B, a justice of the peace of ..... county (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of

the offense), upon which he has been admitted to bail in the sum of ..... dollars; we, E F and G H (stating their place of residence and occupation), Hereby undertake that the above-named C D will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of ..... dollars (inserting the sum in which the defendant is admitted to bail).

In the Dunbar case the Court in construing the Oregon statute which is the same as Sec. 1278 said:

"The requirements is that the bond shall designate the offense generally. The Supreme Court of the State of Oregon in the case of Belt vs. Spaulding, 17 Or. 134, 20 Pac. Rep. 827 held that Sec. 1470 introduces no new rule but left the law just as it was before its enactment. In other words said the Court."

"It is declaratory of the common law upon that subject which the court declared to be that the undertaking must on its face indicate briefly the nature of the offense charged and unless it does so it is not binding that this may be done by name when the offense charged has a technical name, and, if not, then enough must be stated in the undertaking to point out clearly that a particular crime known to law is charged."

"That this is the general rule is shown by the authorities cited by the Court in Belt vs. Spaulding."

The bail bond in the Dunbar case *did* point out clearly that a crime had been committed against the Government of the United States i. e. the unlawful aiding and abetting the landing of Chinese labor in the United States.

In the Dunbar case the Court further said:

In the indictment the names of person or persons with whom the defendant conspired as well as the acts done must of course be stated. But no such particularity is essential in a recognizance *which only* need *state the general nature of the offense.* (Italics ours.)

> "That this may be done by name when the offense charged has a technical name, and, if not then *enough must be* stated *in* the undertaking to *point out clearly* that a particular *crime known to law is charged.* (Italics ours.)

The law enunciated by this Court in the Dunbar case is so clear, so controlling that no citation of authorities or argument is necessary to sustain plaintiff in error, contention that the recognizance sued on is invalid.

In United States vs. Sauer, 73 Fed. 671 the Court said:

> "It is perfectly clear that a recognizance nor the *Sire Facias* upon it will be sufficient to authorize or support a judgment against the principal or sureties when the charge does not appear to be such as may be the subject of a criminal prosecution and which requires bail. To answer to a charge of felony would be sufficiently explicit because for a felony an indictment would lie. But no indictment can be maintained on a charge having in possession stolen goods."

The opinion by the learned Judge in this case is one of much interest and plaintiff in error solicits this court's attention to same.

It may be at this point well to consider just what the Legislature of the State of California meant when it provided in Sec. 1278 that "the nature of the offense must be briefly stated."

In the case of Spaulding vs. Belt cited with approval by the Court in the Dunbar case, it is said:

> "This objection suggests two questions; First, whether or not an undertaking in a criminal proceeding which fails to describe on offense punishable by the laws of the State is for that reason invalid. Second, whether the undertaking in question describes such offense."

In construing Sec. 1470, of the State of Oregon the Court said:

> "Sec. 1470 of Hills code prescribes the form of the undertaking to be given in a criminal case prosecuted before indictment requires that the nature of the crime be briefly stated in such undertaking.
>
> "This Section evidently intends that there should be a crime charged, and that its nature the sum of qualities and attributes which make it a thing what it is, as distinct from others of its kind, sort, character or species, be briefly stated in the undertaking. This statutory requirement then, it is believed introduces no new rule but left the law just as it was before its enactment. In other words it is declaratory of the common law on that subject."

The Court cites numerous authorities on that point then says:

> "The rule announced by these authorities is reasonable. It imposes no inconvenience upon the

> public and it is notice to the bail of the gravity and importance of their undertaking. The undertaking, I think, must on its face indicate briefly the nature of the offense charged and unless it does it is not binding. I do not mean by this that it should be stated with the technical particularity necessary in an indictment, far from it. If the crime charged be one that has a technical name, as murder, arson, burglary, rape, larceny, and the like it will be sufficient to indicate the charge by such general name. If not, enough must be stated in the undertaking to point out clearly and unmistakably that a particular crime known to law of the State is charged."

Can the English language make the interpretation of the statute any clearer?

The interpretation of the Statute by this Court is the rule enunciated by the "common law."

It has the sanction of the legislature of the State of California and is stamped with the approval of the Court in United States vs. Dunbar.

Is there anything further to be said in the matter of establishing Plaintiff in Error's contention that the bail bond does not conform to the requirement of the Statute of the United States and the State of California, and is therefore invalid.

The recognizance in this action cite no facts, describes no offense, names no crime, fails to describe the nature, the sum of qualities which go to make up an offense against the laws of the United States.

The words violation of Sec. 217 of the Penal Code is not descriptive of the offense attempted to be charged, it describes not the nature of the offense, the sum of qualities, and attributes which go to make

up one offense as distinct from other offenses made punishable by Sec. 217 of the Federal Penal Code.

There are distinct and separate offenses provided for by Sec. 217 and for which distinct and separate penalties are provided.

In what way can this Court ascertain from the bond? In what way can the principal or his sureties ascertain? What part or portion of the statute the accused is charged with violating? The sureties were entitled to notice and entitled to be advised of the gravity and importance of the undertaking. Had the recognizance on its face indicated briefly the nature of the offense an entirely different situation might have occurred. The bail was entitled to be advised of the gravity of the offense, the importance of their undertaking.

Keeping now in mind the language of this Court in the Dunbar case:

> "The real question therefore, is whether the recognizance sued on are valid when tested by the requirements of the Oregon statute in regard to bail."
>
> "The requirements is that the bond shall designate the offense generally. The Supreme Court of Oregon in the case Belt vs. Spaulding 17 or 134, 20 Pac. 827 held that Sec. 1470 of the Oregon Statute introduces no new rule but left the law just as it was before its enactment. In other words said the Court, it is declaratory of the Common Law upon the subject which the Court declared to be that the undertaking must on its face indicate briefly the nature of the offense, and unless it does so it is not binding that this may be done by name when the offense

> charged has a technical name, and if not, then enough must be stated in this to point clearly that a particular crime known to law is charged."

Therefore, now consider and weigh the bail bond upon which the action is predicated in connection with the law enunciated by this Court. Keeping in mind the provision of Sec. 1287 of the Penal Code of the State of California that C. D. be held to answer upon a charge of (stating briefly the nature of the offense) upon which he has been admitted to bail in the sum of .....dollars.

The bond alleges Joseph Bruno is charged with THE CRIME OF VIOLATING OF SECTION 217, Federal Penal Code.

Sec. 217, Federal Penal Code is not a crime, it is an act of Congress under which provisions of this act of Congress certain enumerated things are forbidden to be placed in the United States mails.

The various acts enumerated therein carry different degrees of punishment. The bail bond should briefly state the nature of the acts which constitute the offense for the purpose of contra-distinguishing the particular act from the several other acts which go to make a crime under the provisions of Sec. 217 of the Federal Code. The sureties were entitled to be advised and know the nature and gravity of the act which the accused was charged know what punishment might be inflicted in case of conviction.

California Jurisprudence (Vol. 3, p. 1062.)

> "There are two lines of decision in regard to the necessity that the bond contain a description of the offense. The one which appears to

be supported by the weight of authority holds that the bond must give a description of the offense with which the principal is charged as a means of identifying the case and informing the principal and sureties of the prosecutions assumed. In California the Code prescribes a form of bail bond which must be substantially followed, which requires a brief statement of the nature of the offense. (Sec. 1278 of the Penal Code.) But it is not necessary that the bail bond describe the offense with the same particularities as required in an indictment."

Vol. 3 Ruling Case Law (p. 38, Sec. 43.)

"The weight of authority would seem to make it necessary to the validity of a bail bond or a recognizance for it to set forth the offense with which the accused is charged and a statement containing technical defects in bonds if they are substantially correct will not remedy failure to describe the offense."

Corpus Juris (Vol. 6.)

"The bond or undertaking as a general rule should conform to the statutory requirements. If there is a material variance between the bond as prescribed by law and the bond as executed the latter will be void."

Roe v. State, 24 S. 20, 28.

The Court of Criminal Appeals of the State of Texas said:

The appellant was convicted of crap playing, the State moves to dismiss the case because recognizance shows no offense in stating the game was not played in a private residence, Penal Code, 364, *This not being an offense eo-nomine the elements must be set forth in the Sire Facias and recognizance.* (Italics ours.)

THE BOND IS INVALID FOR THE REASON THAT IT CONTAINS NO PROMISE ON THE PART OF THE SURETIES THAT IF THE ACCUSED FAILS TO PERFORM THE CONDITIONS NOMINATED IN THE BOND THAT *THEY WILL PAY* TO THE UNITED STATES GOVERNMENT THE SUM IN WHICH THE ACCUSED IS ADMITTED TO BAIL.

The Dunbar case we wish to carefully distinguish from the case at bar.

In the Dunbar Bond the Sureties acknowledged that "WE OWE TO THE UNITED STATES GOVERNMENT," the present bond acknowledged no existing debt and contains no promise to pay.

The sureties undertake nothing more then the accused shall answer the accusation whenever or wherever the same may be prosecuted. There is no direct promise by the sureties that they will, in case of the accused defaulting, pay the amount of bail in which the accused is released. No interpretation can be placed on the conditions nominated in the bond that can supply the essential and requisite "we promise to pay", in case of default. The action is predicated upon a contract.

Sec. 1269 of the Penal Code of California, defines the taking of bail:

> "The taking of bail consists in the acceptance by a competent Court of Magistrate of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking *or that the bail will pay to the people of the state a specified sum.*" (Italics ours.)

No promise on the part of the sureties can be read into the bond annexed to the Complaint that can be construed as a promise to pay to the Government the amount of bail.

There is nothing in the contract between the parties that can be construed directly or indirectly as a substitute for that essential promise. A valid and binding contract for the payment of the amount of bail was not entered into. The Code requires a promise to pay in case of default and the law of contracts requires it for there must be a meeting of the minds.

In the Dunbar case the recognizance obligated the securities to "OWE" the United States. In other words by the terms of the bond the accused and his sureties acknowledged themselves indebted to the United States which indebtedness was to be wiped out if the accused performed the conditions of the bond. The bond in this action acknowledges no indebtedness and contains no direct promise to pay on the part of the sureties. Hence, there is no meeting of minds, no contract.

IN SAN LUIS OBISPO COUNTY vs. RYAN, 175 CAL, 34-180 PAC. 342, the Supreme Court of the State of California said:

> "One of the conditions provided for by the code to be inserted *in such bond, and in fact the essential requirements as far as sureties thereon is concerned.* (Italics ours.) Is that in the event the defendant fails to do or perform certain things the sureties will pay to the State of California, a sum particularly specified, being the

amount in which the defendant is admitted to bail. In fact to pay a designated penal sum in the event of the delinquency of their principal.

"It is a familiar rule of law that sureties cannot be held beyond the terms of their contract of suretyship."

"The law requires and the form of bond set out in the code provides, that the sureties shall bind themselves in the event the appealing defendant fails to do a certain thing they will pay to the State of California a specified sum. A valid bond would have provided that "we (the sureties), will pay to the State in the event our principal fails to comply with any of the conditions the sum specified as a penalty. There being nothing in the bond which bound them to pay any penal sum in the event of the delinquency of the principal and standing upon the strict terms of their contract, they can not be compelled to do it. This should require no further discussion. The code provisions, it is true, contemplated that sureties on a bail bond should bind themselves and the bond should so provide, but the trouble the bond here is that it does not do so and this Court can not make a different contract for the parties then they themselves have made." The case of Merced v. Shaffer, et al., 40 Cal. App. Rep. 163, is a persuasive authority sustaining plaintiff in error contention.

THE BOND IS INVALID FOR THE REASON IT DOES NOT REQUIRE ACCUSED TO APPEAR IN SOME COURT.

To force the accused to appear "whenever" or "wherever" and answer said charge or any matter or thing that may be objected, against him is too

indefinite, uncertain and onerous to make a valid and binding contract and is not in compliance with the law.

The Statutory form of bond required by the State of California (Sec. 1278) requires that accused shall be recognizant to appear before a court.

Corpus Juris (Vol. 6, p. 1017.)

> "The bail bond must properly designate the Court before which the accused is to appear and if such court is not properly designated the undertaking is defective."
>
> "A recognizance is defective when it cannot be ascertained whether the appearance is to be before a magistrate for examination or before a court for trial."
>
> Grigshy vs. The State, 6 Yerg. 334 (Tenn.);
>
> Sherman vs. State, 4 Kan. 570.

The court is without legal jurisdiction to recognizant a person to appear in any place other than a duly and legally constituted Court or tribunal.

In Mader vs. State Tex. Criminal Court of Appeals, 34 S. W. 114,

> "A recognizance which does not specify the Court before which defendant shall appear is fatally defective."

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The bond is a contract, in every contract certain contractual rights, obligations, and duties exist between the parties.

The bond specifies no court or tribunal where the

defendant is to appear, it specifies no time for him to appear.

A contractual duty therefore is imposed upon the government to inform the accused and his sureties when said cause is to be heard and WHERE said cause is to heard.

Keeping in mind the conditions nominated in the bond and the contractual duty the parties let us examine the complaint.

Paragraph V of the complaint makes the only reference to this matter:

> "That after proceeding had and upon notice to these defendants John G. Moran and W. E. Smith the said cause was set down for hearing on the 13 day of Nov. 1923, that on that said date the said Joseph Bruno, defendant in said action, failed to appear before the said commissioner and the sureties on said bail bond, John G. Moran and W. E. Smith were called to produce the said Joseph Bruno but they failed to produce him; where upon said commissioner declared said bond to be forfeited."

The complaint is as silent as the grave where the accused is to appear and where the cause is set for hearing. The undertaking imposes a duty on the part of the government to inform not only the sureties but the accused as well WHERE HE SHALL APPEAR as well as when he shall appear and answer.

As a matter of illustration it might have been in this case, as well as it occurred frequently in other cases in the days of 1923, the commissioner held his

proceedings in various places, sometimes in one place, sometimes in another; the accused might have appeared on the 13 day of Nov. 1923 in the regular court room of the commissioner and for some reason unknown to the accused the commissioner was holding court some where else.

If it is mandatory on the Government to inform the sureties when the defendant is to appear and answer, it is equally mandatory to inform them where he shall appear and answer. If it is essential to allege in the complaint when the cause if set for hearing, it is equally essential to allege where it is set for hearing.

The time of day when the accused is to appear is essential to a proper notice.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

I. It is not alleged the commissioner called the cause for hearing or that he called upon the defendant to appear and answer to the charge against him.

II. It is not alleged that judgment was entered upon the forfeiture.

III. It is not alleged that the bond is a matter of record.

Addressing myself to the first proposition it is conditioned in the bond that the accused shall not only appear but he shall appear AND answer said charge, that is, he must answer before the bar of Justice any matter or thing that may be objected against him.

It is not meant by the terms of the bond that there shall be a mere physical appearance of the accused in the court room, but it is meant by appearance that the accused shall after the cause is called by the court APPEAR AND ANSWER to the call. It is not alleged in the complaint the cause was called for hearing or that the commissioner called *upon the defendant to appear and answer.* The complaint is bad for that reason.

Peck vs. State, 4 Ga. 329, said:

> "Before the sureties can become liable the record must show that the principal was called and did not appear. There must appear upon the record a judgment of forfeiture. This judgment is a matter of substance it involves serious consequences to the parties it is of such absolute verity that nothing can be urged against it."

To the same effect is the case of State of West Virg. vs. Dorr, 53 So. E. 120. In McGuire vs. State, 124 Ind. 23 N. E. 85.

The court said:

> "It is not sufficient to call and default the recognizance; but that it is also necessary the court should enter a formal judgment of forfeiture."

Vol. 8 Am. Cases Pg. 1020, 44 W. Va. 308, 28 S. E. 930.

> "Calling the accused and entering default upon record is a condition preceding to forfeiture of recognizance."

In U. S. V. Rundlett Fed. Case No. 16208 the Court said:

> "To maintain action on a recognizance the declaration must show a breach of its condition

and as the recognizance is required and taken by the commissioner pursuant to an authority conferred on him by law and to satisfy certain legal requirements, the nature, extent, and limitations of the responsibility created thereby, are to be determined not by a mere examination of the terms of the instrument but also by the rules of law which are applicable thereto."

"One of these rules of laws required the principal cognizor to be called and his default entered; and the legal effect of the conditions is such that it is not broken by nonappearance generally to be proven by any evidence, but only by nonappearance in answer to a call, to be proven by an entry made in the minutes of a magistrate and returned by him as a part of the proceedings.

"It is clear also that a declaration must show upon a default a time and place when and where the cognizor was bound by law to answer."

In George Brooks vs. the U. S., 6 N. M. 72, the court said:

"It is essential to a breach of contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned before his default was entered. A recognizance is not forfeited except by the failure of cognizor to appear and answer a call made at the proper time and place. The declaration being fatally defective the court should have sustained the demurrer."

In Dillingham vs. U. S. 4 Wash. 422, the Court said:

"We hold it to be essential to a breach of the condition upon which the forfeiture is to arise that the party who is recognizant to appear should be solemnly called before his default is

> entered it should be clearly proved that the party was called and neglected to appear. This is far from being a matter of form only but on the contrary is a human provision to prevent a forfeiture from ignorance of the accused."

Plaintiff contends, that the Court must, before declaring the bond forfeited required the defendant to be called "to come into court," and that in the event the defendant does not answer the call, that the bondsman shall each be called separately "to produce the body of the defendant as you have promised to do or forfeit your bond."

This is a condition prerequisite which must be alleged and proven.

THE COMPLAINT IS BAD FOR THE REASON IT IS NOT ALLEGED THAT THE BOND WAS FILED IN COURT OR THAT IT BECOME A MATTER OF RECORD.

In the Case of Mendicino Co. v. Lamar, 30 Cal. 629, the Supreme Court of the State of Cal. said:

> "It is objected that the complaint does not aver that the recognizance was filed in court or become a matter of record."
>
> "A recognizance is an obligation of record; and in an action on such obligation it should be alleged that the same was a record."

The Court Erred in not sustaining the demur on the ground of uncertainty.

The complaint is ambiguous and uncertain for the reason that it cannot be ascertained therefrom who set the cause for hearing on the 13 day of November

1923, who informed the defendant that said cause was set on said date, it is uncertain for the reason that it can be ascertained from the complaint, how the sureties were informed that said cause was set for said dates, or that they were informed of that fact, the complaint is uncertain for the reason that it cannot be ascertained from the complaint or bond for what offense the bond is given. The complaint is uncertain for reason it can be ascertained the date the bond was declared forfeited. The demurrer should be sustained on the grounds set forth in the demurrer.

Respectfully submitted,

.....

Attorney for Plaintiff in Error.

No. 4626.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John G. Moran,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error,
Joseph Bruno and W. E. Smith,
Defendants.

BRIEF OF DEFENDANT IN ERROR.

SAMUEL W. MCNABB,
United States Attorney;
J. EDWIN SIMPSON,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 4626.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John G. Moran,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error,
Joseph Bruno and W. E. Smith,
Defendants.

BRIEF OF DEFENDANT IN ERROR.

The United States of America, defendant in error, filed a complaint in the United States District Court for the Southern District of California to recover ten thousand dollars ($10,000) damages and costs for breach of a contract in the nature of a bail bond or recognizance. The general and special demurrer filed by the plaintiff in error, John G. Moran, was overruled and answer filed. The cause was regularly set for trial and the findings were in favor of the defendant in error. Judgment was entered in favor of the

defendant in error for the sum of ten thousand dollars ($10,000), and costs. The plaintiff in error sued out a writ of error to review the judgment of the lower court. The defendants Joseph Bruno and W. E. Smith have never been served with process and are not parties to this appeal.

Statement of Facts.

The complaint in substance alleges that an affidavit of complaint was filed before the United States Commissioner at Los Angeles, California, on July 5, 1923, charging Joseph Bruno with having violated section 217 of the Federal Penal Code by mailing narcotics in the United States mails, the said offense having been committed at Los Angeles, California, on or about June 27, 1923; that Bruno was arrested upon a warrant of arrest duly issued upon the said affidavit of complaint, was brought before the United States Commissioner and duly admitted to bail in the sum of ten thousand dollars ($10,000), pending examination on said charge; that to secure the release of Bruno from the custody of the United States Marshal on said charge, Joseph Bruno, principal, and plaintiff in error, and W. E. Smith as sureties, executed a bail bond before the United States Commissioner, a copy of which is attached to the bill of complaint and marked Exhibit "A"; that in consideration of the execution of Exhibit "A" Bruno was released from the custody of the United States Marshal into the custody of the sureties; that the cause was regularly set for hearing November 13, 1923, after notice to the sureties, and that upon

the failure of Joseph Bruno to appear and upon failure of the sureties to produce him, the Commissioner declared the bond forfeited.

It appears from an endorsement on the bail bond that it was filed before and with the said United States Commissioner July 6, 1923, and was thereafter filed with the clerk of the United States District Court for the Southern District of California. [Tr. p. 10.]

The demurrer filed by plaintiff in error is general and special and attacks the validity of the bail bond and complaint.

The answer likewise challenges the sufficiency of the complaint and bail bond but admits the arrest of Bruno on the date alleged in the complaint, admits that Bruno was brought before the said Commissioner on a criminal charge, admits that Bruno was admitted to bail in the sum of ten thousand dollars ($10,000), pending examination on said charge, and admits the execution by plaintiff in error of Exhibit "A" attached to the complaint of the defendant in error; admtis that Bruno was released from the custody of the marshal. The answer alleges that Bruno was arraigned on the complaint and the cause set for hearing July 31, 1923. The answer alleges that certain continuances were had and that the cause was continued without the consent of plaintiff in error and that plaintiff in error had no notice that the said cause was set for hearing November 13, 1923.

The court found that these allegations of the answer were untrue and found to the contrary that the cause was continued with the knowledge and consent of

plaintiff in error to November 13, 1923, and that plaintiff in error was notified that the cause was set for hearing on such date. [Tr. p. 23.]

Issues.

Plaintiff in error contends that the court erred in overruling the demurrer. In support of this contention he urges, first, that the bail bond is invalid, and second, that the complaint is insufficient.

We shall consider these contentions of plaintiff in error in the order advanced by him in his brief.

I.

The Bail Bond Is Valid for the Reason That It Sufficiently States the Nature of the Offense.

Section 1014 of the Revised Statutes provides in part that

> "the offender may * * * agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed."

Section 914 of the Revised Statutes provides in part,

> "the practice, pleadings, and forms and modes of proceeding in civil causes * * * in the * * * district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such * * * district courts are held."

The term "mode of process" in section 1014, R. S. *supra,* means "mode of proceeding." (U. S. v. Zara-

finitis, 150 Fed. 97, C. C. A. 5.) (U. S. v. Dunbar, 83 Fed. 153.) The term "modes of proceeding" used in section 914, R. S. *supra,* is used in distinction to the word "forms", but the word "forms" is not used in the former section. While these two statutes are dissimilar in that one applies to civil causes and the other to criminal causes, they are nevertheless both in the nature of conformity statutes intended to assimilate proceedings in the district courts to the proceedings had in the state court in which the district court is held, with the limitation that the proceedings shall conform only insofar as district courts shall conform them. Comparison of these two statutes is valuable as illustrating that Congress did not intend that the *form* of bail in the federal court should absolutely and entirely conform to the *form* of bail in the state courts, for otherwise the term "form" would have been used in Revised Statutes, section 1014.

As pointed out by this court in the case of the United States v. Dunbar, 83 Fed. 153, the provisions of the Oregon Statute concerning bail are similar to the provisions of the common law. The provisions of the California Penal Code concerning bail are similar to the provisions of the Oregon Statute and are of value as stating the common law. A bail bond in the federal courts in California is tested by the provisions of the Statutes of California only because the California Statute is declaratory of the common law, and this test applies only insofar as the federal courts apply it.

Section 1278 of the Penal Code of California provides that bail "may be substantially in the following form." A substantial description of the general nature of the offense charged is required to be set forth in the bail bond for the purpose of identifying the case with some case in which an indictment, information, or complaint has been filed. (3 California Jurisprudence 1062.)

In the case of United States v. Sauer, 73 Fed. 671, the court said:

> "To answer to a charge of felony would be sufficiently explicit because for a felony an indictment would lie."

In 6 C. J. 998, the following rule is given:

> "In federal cases a sufficient specification of the charge is that the accused appear to answer such matters and things as have or shall be objected against him."
>
> U. S. v. Graner, 155 Fed. 679;
> Kirk v. U. S. 137 Fed. 753, Aff. 204 U. S. 668.

In the instant case the complaint alleges, and the court found, that Joseph Bruno was charged with a "violation of section 217 of the Federal Penal Code, committed on or about the 27th day of June, 1923, to-wit: In the Los Angeles, California District aforesaid," and the bail further recites:

"Now, therefore, if the said Joseph Bruno shall appear and answer said charge, or any matter or thing that may be objected against him." [Tr. p. 8.]

A violation of section 217 of the Federal Penal Code is an offense against the United States and a crime. It is a violation of that section to mail poisons in the United States mails and narcotics are poisons.

Plaintiff in error when he signed the bail bond had notice of the Statute of the United States which was alleged to have been violated and, as he alleges in his answer, produced Bruno for hearing before the Commissioner on the charge. While the bail might have been more specific and might have set out in detail the full description of the offense charged, it is submitted that the bail sufficiently conforms to the requirements of the law and that plaintiff in error has not been injured.

If the description of the offense in the bail were insufficient the reference to the affidavit of complaint would cure the defect, for it would give the surety notice and he could, from an examination of the complaint, fully ascertain the gravity of the offense charged. (Commonwealth v. Merrian, 7 Allen (Mass.) 356.)

If, as stated in the *Sauer* case, *supra,* a statement that the offense is a felony, is sufficient, and if, as the authorities above cited hold, the description of the offense is required simply for the purpose of identifying the case, then surely a bail bond which recites the time and place of the commission of the offense and recites that a particular section of the Federal Penal Code has been violated, and which refers to the criminal pleading which contains the charge upon which the warrant of arrest has been issued, is sufficient.

II.

The Bail Bond Is Valid for the Reason That It Contains an Acknowledgment of Indebtedness and a Promise to Pay the Debt.

The contention of plaintiff in error that the bail contains no promise to pay, is technical, unreasonable and not in accordance with law, or the provisions of the bail.

In the case of Dunbar v. U. S., 83 Fed. 153, cited by plaintiff in error, the bail provided, "We owe to the United States government." Plaintiff in error concedes that this is sufficient and such is the law. The bail in the instant case contains a clear acknowledgment of the debt and a promise to pay the same within the holding of the *Dunbar* case.

The bail (Exhibit "A") recites:

"That we Joseph Bruno as principal, and John G. Moran and W. E. Smith as sureties, are held and firmly bound unto the United States of America, in the sum of ten thousand dollars, to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our executors and administrators, firmly by these presents."

The term "held and firmly bound" was contained in the bail filed in the case of Shattuck v. People, 5 Ill. 477, 480. The court in holding this expression to be equivalent to "owes and is indebted", said:

> "The obligation in question, though not technically, is substantially in the form of the common law recognizance. In one the party acknowl-

> edges that he is held and firmly bound to pay. In the other, that he owes and is indebted. This language, though variant in form, has the same force and meaning."

In the case of Douglas v. Hennesy, 15 R. I., 272, 282, the court held that the expression, "to which payment well and truly to be made I bind myself", contained in a condition of defeasance sufficiently imported a promise to support an action of covenant.

"An acknowledgment of a person that he is bound to pay is equivalent to a promise to pay." Milner v. Bainton, 1 Del. 144.

The bail in the instant case, as above quoted, plainly and specifically acknowledges an existent and continuing indebtedness of plaintiff in error to the United States in the sum of ten thousand dollars ($10,000), and contains a promise to pay that indebtedness if any of the conditions therein are not complied with, for the bail recites: "Then shall this recognizance be void, otherwise to remain in full effect and virtue." The conditions of the bail bond have not been complied with and it is, therefore, not void but is in full force and effect.

III.

The Bail Sufficiently Describes the Place Where the Accused Is to Appear.

The bail in the instant case contains the following endorsement: "United States District Court, Southern District of California, before United States Commissioner." [Tr. p. 10.]

The bail recites that Bruno, * * * "pending examination has been duly admitted to bail in the sum of ten thousand dollars. Now, therefore, if the said Joseph Bruno shall appear and answer said charge or any matter, or thing that may be objected against him wherever and whenever the same may be prosecuted, * * *." This is as definite as section 1278 of the Penal Code of California, which provides in part:

> "Hereby undertake that the above named will appear and answer the charge above mentioned in whatever court it may be prosecuted."

In People v. Carpenter, 7 Cal. 402, it was held that a bail bond need not state in what court the defendant shall appear as the law provides in what court he shall be tried.

The reason for requiring the bail to specify some place for appearance is to disclose a court having jurisdiction of the offense and to give notice where the accused is to appear. In the present case the accused was to appear before the Commissioner for examination upon the charge contained in the affidavit of complaint filed against him. If he and the sureties knew before what tribunal he was to appear they were not prejudiced. That they did have such knowledge and notice is disclosed on page 23 of the Transcript of Record in this case, where the court found.

"That on July 6, 1923, upon the arraignment of the defendant Joseph Bruno, and the execution of the bond by these defendants, the court, in the presence of the defendants continued the preliminary of the defendant Joseph Bruno until July 31st, which said

continuance was with the express consent of the defendants; that upon July 31st, the hearing was, in the presence of the defendant continued to September 4th at the request of the plaintiff and defendant Joseph Bruno; that on September 4th, 1923, the cause was continued with the consent of both parties and set for hearing on September 20th, 1923; that on September 20th, 1923, the cause was in like manner continued to September 27th, 1923; that on September 27th, the cause was in like manner continued until October 11th, 1923; that on October 11th, 1923, the cause was continued to October 22nd, 1923, for hearing, at the request of the bondsmen John G. Moran and W. E. Smith, upon the statement by them that the defendant Joseph Bruno was ill in a hospital; that on October 22, 1923, the cause was continued for hearing to October 29th, 1923, at the request of Arthur Chapman, attorney for the defendant; that on October 29th, 1923, the cause was continued one week, the attorney for the defendant being present, but the defendant Joseph Bruno being absent; that thereafter the cause was in like manner continued until November 13th, 1923, at which said time the defendant Joseph Bruno was called by the Marshal and the defendants John G. Moran and W. E. Smith were by the Marshal called to produce the body of the said Joseph Bruno; that the defendants failed to appear and it was by the Commissioner ordered that his bond be forfeited."

In the *Dunbar* case the court said:

> "The failure of the sureties to produce their principal for trial when called upon to do so at the time regularly set for trial, was sufficient notice to them. No other notice was required."

It is undisputed in this case that the United States Commissioner at Los Angeles, California, had jurisdiction to conduct the examination of Bruno upon the charge contained in the affidavit of complaint. It is undisputed that plaintiff in error was notified at all times that the proceedings were to be held before the United States Commissioner at Los Angeles, California, and the undisputed finding of the court to the effect that plaintiff in error was notified to produce the accused before him on a day certain are sufficient answer to this contention of plaintiff in error.

The Complaint States a Cause of Action.

Paragraph 5 of the complaint [Tr. p. 6], and the above quoted findings of the court are sufficient answer to plaintiff's contention that plaintiff in error was not notified of the time and place for the appearance of the accused. Plaintiff in error was sufficiently notified of these facts within the above quoted rule of the *Dunbar* case.

We respectfully invite the attention of the court to the findings of the court and to the complaint filed herein, and respectfully urge that they are sufficient answer to the contention set forth on page 16 of the Opening Brief of plaintiff in error to the effect that the Commissioner did not call the cause for hearing, or that the accused was not called to appear and answer the charge against him.

IV.

Plaintiff in error states, but does not argue, that it is not alleged that judgment was entered upon the forfeiture. The complaint does allege that the Com-

missioner declared the bond to be forfeited. [Tr. p. 6.] The proceeding from which plaintiff in error is now appealing is one to reduce this forfeiture to an absolute judgment.

V.

It appears from the bail, which is a part of the complaint, and Exhibit "A" thereof, that it was first filed in the Commissioner's court and thereafter in the District Court. [Tr. p. 10.] In the case of Mendicino County v. Lamar, 30 Cal. 629, it appears that no such endorsement was on the bond and that case is, therefore, by inference, authority for the validity of the bail bond in the instant case.

Conclusion.

For the reasons hereinabove set forth the ruling of the court in overruling the demurrer was proper and the court properly held the complaint and bond to be sufficient for the reason that the bail bond substantially conformed to the requirements of the common law and of the state of California by stating the nature of the offense sufficiently to identify the case, properly held that the bail bond contained an acknowledgment of indebtedness and a promise to pay, and properly held that the bail bond sufficiently designated the time and place for the appearance of the accused.

It is respectfully submitted that the judgment of the District Court should be affirmed.

SAMUEL W. MCNABB,
United States Attorney;
J. EDWIN SIMPSON,
Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 4634

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4634

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF COUNSEL.

JOHN J. SULLIVAN, Esquire, Attorney for Appellant,
1801–02 L. C. Smith Building, Seattle, Washington.

F. C. REAGAN, Esquire, Attorney for Appellant,
1902–04 L. C. Smith Building, Seattle, Washington.

JOHN F. DORE, Esquire, Attorney for Appellant,
1902–04 L. C. Smith Building, Seattle, Washington.

Messrs. PATTERSON & ROSS, Attorneys for Appellee,
805-07 Dexter Horton Building, Seattle, Washington.

V. G. FROST, Esquire, Attorney for Appellant,
1801–02 L. C. Smith Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus and for a Writ of Certiorari.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division:

The petition of T. H. Johnson respectfully shows to this court that the petitioner is now imprisoned, detained, confined and restrained of his liberty, by Matt Starwich, Sheriff of King County, Washington, in the County Jail of King County, State of Washington, at Seattle in said County, which said imprisonment, detention, confinement and restraint is illegal, the illegality thereof consisting in this, to wit:

I.

That in a certain proceeding in the Superior Court of the State of Washington for King County, before the Honorable Mitchell Gilliam, Judge, in the Matter of the Extradition of R. C. James, *alias* T. H. Johnson, the same being No. 179090, there was filed an amended complaint; which charged that your petitioner, on December 12, 1924, at Nanaimo, British Columbia, did by himself alone, and not with others, by violence, commit the crime of robbery upon Robert Husband, an accountant of the Royal Bank of Canada, at Nanaimo.

That thereafter, upon the filing of said amended complaint, [2] the said Mitchell Gilliam, Judge, issued *what* a warrant, being in the name of the State of Washington and directed to Matt Star-

wich, as Sheriff of King County, Washington, to arrest your petitioner by reason of the filing of said amended complaint and imprison him in the King County Jail.

That the said Matt Starwich, who was then and there the Sheriff of King County, State of Washington, and who was not then, or at any of the times herein mentioned authorized by the laws of the United States to serve warrants of arrest issued by and under the authority of the United States, did on the 6th day of January, 1025, pretending to act under and by virtue of the authority of the warrant hereinbefore described, arrest and seize the body of your petitioner and place him in confinement in said County Jail, and ever since said time has restrained him of his liberty in said jail.

That on the 12th and 15th day of January, 1925, your petitioner was brought forcibly and against his will before said Mitchell Gilliam, and against the timely objections of your petitioner that said Mitchell Gilliam had no jurisdiction over the person of your petitioner, and no jurisdiction over the subject matter in extradition proceedings under the laws and treaties of the United States, and the said Mitchell Gilliam did then and there have read to him depositions concerning a crime of robbery, referred to in said amended complaint; that this testimony was heard over the objection of your petitioner; that at the conclusion of the reading of the said depositions, to wit, January 15, 1925, the said Mitchell Gilliam, over the aforesaid objections of

your petitioner, did make, sign and file in the office of the Clerk of the Superior Court of the State of Washington for King County, a certain paper denominated a commitment; that acting under and by the authority of said commitment, said Matt Starwich again confined your petitioner, and is now confining him in the King County Jail, in Seattle, Washington. [3]

II.

That your petitioner was denied a fair hearing and that there was no evidence whatsoever to support the charge against him; that there was no evidence to establish probable cause; that despite the fact that there was no evidence the said Mitchell Gilliam arbitrarily and wrongfully issued a warrant of commitment; that the same is arbitrary and unsupported by fact or law.

III.

That the entire record upon which said Mitchell Gilliam acted is attached hereto, marked Exhibits "A," "B," "C," and "D," consisting of the amended complaint, the depositions, the warrant and the commitment.

IV.

That at said hearing for extradition your petitioner offered to produce witnesses to prove that he did not commit the crime charged in said complaint and that he was not in the Dominion of Canada on December 1, 12 and 13, 1924, but that at said time he [4] was in the State of California; that he had never fled from Canada and had never

been in the City of Nanaimo or in the bank in question; that he offered to prove said facts by himself and other witnesses, and that said Mitchell Gilliam, sitting as Extradition Commissioner, refused to allow him to produce any testimony in his own behalf and refused to allow him to introduce any testimony tending to prove that he was not a fugitive from justice and that he had not been in Canada on the dates specified.

V.

That at the conclusion of the testimony offered by the Dominion of Canada the said Mitchell Gilliam arbitrarily and wrongfully caused said hearing to be closed and refused to allow your petitioner to introduce testimony showing that there was no probable cause to believe he had committed the offense charged in said complaint.

VI.

That said detention of your petitioner is based upon certain papers alleged to be filed by the Dominion of Canada before the said Mitchell Gilliam, and certain proceedings had thereon as aforesaid; that the treaties and laws of the United States have not been complied with; that no probable cause has been shown for the extradition of your petitioner, a citizen of the United States, to the Dominion of Canada for trial; that said attempted extradition is in every respect illegal and wrongful and arbitrary and without probable cause for belief that your petitioner has committed any crime whatsoever in the Dominion of Canada.

VII.

That in order that the matter of this petition for writ of habeas corpus be properly disposed of and that this court may be fully advised in the premises, it is necessary that a writ of certiorari issue, directed to the said Mitchell Gilliam, acting as [5] Extradition Commissioner under the laws and treaties of the United States, to certify to this court the said amended complaint, and the warrant and the order of commitment upon which your petitioner was and is now being held, and that he certify also to this court the testimony by depositions filed with him, wherein he alleges he found probable cause for the extradition of your petitioner; that unless a writ of certiorari is issued, this court will be unable to fully hear and determine said writ of habeas corpus.

WHEREFORE, your petitioner prays for an order of this court, directed to Matt Starwich, Sheriff of King County, Washington, commanding him to show cause, if any he have, before this court, at a time and place to be fixed by the court, why a writ of habeas corpus should not issue herein, as prayed for, and that your petitioner be restored to his liberty. And your petitioner further prays that this court issue a writ of certiorari, directed to the said Mitchell Gilliam, sitting as Extradition Commissioner, commanding him to certify to this court the said amended complaint, the warrant and the order of commitment upon which your petitioner is being held, and all testimony and deposi-

tions heard by him and filed with him in said matter.

T. H. JOHNSON,
Petitioner.

JOHN J. SULLIVAN,
JOHN F. DORE,
V. G. FROST,
Attorneys for Petitioner. [6]

United States of America,
State of Washington,
County of King,—ss.

T. H. Johnson, being first duly sworn, on oath deposes and says:

That he is the petitioner named in the foregoing petition; that he had read said petition, knows the contents thereof, and believes the same to be true.

T. H. JOHNSON.

Subscribed and sworn to before me, this 16th day of February, 1925.

[Seal] IRENE DYCHES,
Notary Public in and for the State of Washington,
Residing at Seattle. [7]

In the Superior Court of the State of Washington for King County.

Before the Honorable MITCHELL GILLIAM, Judge, Acting as Extradition Commissioner.

No. 179090.

In the Matter of the Extradition of R. C. JAMES, *alias* T. H. JOHNSON.

AMENDED COMPLAINT.

State of Washington,
County of King.

BERT C. ROSS, being first duly sworn, on oath says:

That, on the 12th day of December, A. D. 1924, at the City of Nanaimo, in the Province of British Columbia, R. C. JAMES, *alias* T. H. JOHNSON, did commit the crime of ROBBERY, as follows, to wit: That R. C. JAMES, *alias* T. H. JOHNSON on the 12th day of December, A. D. 1924, at the city of Nanaimo, in the Province of British Columbia, un lawfully then being armed with a certain offensive weapon, to wit, a revolver, wilfully, unlawfully, and feloniously, with and by means of violence then and there used by him to Robert Husband, accountant then in charge of the Royal Bank of Canada at Naniama, aforesaid, to prevent resistance, violently stole in the presence of the said Robert Husband and against the will of said Robert Husband the sum of Forty-two Thousand Dollars,

the property of the Royal Bank of Canada, contrary to the form of statute in such case made and provided, and

He, said R. C. JAMES, *alias* T. H. JOHNSON, on the 19th day of December, A. D. 1924, in the Province of British Columbia, County of Victoria, was charged by an information and complaint duly sworn to before J. H. McMullin, a Justice of the Peace in and for said Province of British Columbia, with the crime of ROBBERY, and thereafter a warrant was duly and regularly issued for the arrest of said [8] R. C. JAMES, *alias* T. H. JOHNSON, in the words and figures as follows, to wit:

"WARRANT IN THE FIRST INSTANCE TO APPREHEND THE DEFENDANT.

Canada: Province of British Columbia, County of Victoria.

To all or any of the Constables or other Peace Officers in the said County of Victoria.

WHEREAS, R. C. James, of address unknown has this day been charged upon oath before me a Justice of the Peace in and for the said Province of British Columbia unlawfully then being armed with a certain offensive weapon, to wit: a revolver, did with and by means of violence then and there used by him to Robert Husband, accountant then in charge of the Royal Bank of Canada at Nanaimo aforesaid, to prevent resistance, violently stole in the presence of the said Robert Husband and against the will of said Robert Husband the sum of

Forty-two Thousand Dollars, the property of the Royal Bank of Canada.

These are therefore to command you in His Majesty's name forthwith to apprehend the said R. C. James ———, and to bring him before me or some other Justice of the Peace in and for the said County, to answer unto the said charge, and to be further dealt with according to law.

GIVEN under my hand and seal this 19th day of December, in the year one Thousand Nine Hundred and Twenty-four, at Victoria in the County aforesaid.

[Seal] (Signed) J. H. McMULLIN,
A Justice of the Peace in and for the said Province of British Columbia."

That the crime alleged in said complaint and warrant is equivalent to the crime of robbery under the laws of the State of Washington.

That the crime alleged is an extraditable offense under the treaties existing between the Governments of a Great Britain and of the United States of America with reference to the extradition of persons charged with crime.

That he, said R, C. JAMES, *alias* T. H. JOHNSON, fled from said Province of British Columbia, Dominion of Canada, and now is in the County of King, State of Washington, one of the States of the United States of America; that he is a fugitive from justice and liable under the treaties aforesaid and the constitution and laws of the United States to be delivered to the Province of British Columbia, Dominion of Canada.

That the proper authorities are proceeding as rapidly as possible in procuring the necessary extradition warrant and [9] papers for the purpose of returning said R. C. JAMES, *alias* T. H. JOHNSON, to the Province of British Columbia, Dominion of Canada, for trial.

That this affiant, the said Bert C. Ross, is acting herein and makes this complaint for and on behalf of the Dominion of Canada and at the request and by the direction of the government of the Dominion of Canada.

BERT C. ROSS.

Subscribed and sworn to before me this 9th day of January, A. D. 1925.

GILLIAM,

Judge of the Superior Court of the State of Washington, a Court of Record of General Jurisdiction, Acting as Extradition Commissioner Under and by Virtue of the Laws of the United States. [10]

EXHIBIT "B."

In the Superior Court of the State of Washington for King County.

Before the Honorable MITCHELL GILLIAM, Judge, Acting as Extradition Commissioner.

No. 179054.

In the Matter of the Extradition of R. C. JAMES, *alias* T. H. JOHNSON.

WARRANT.

The State of Washington, to the Sheriff of King County, GREETINGS:

WHEREAS, in conformity with the treaty of extradition existing between the United States of America and the Kingdom of Great Britian and in accordance with the provisions of the statutes for carrying the same into effect, complaint has been made before me, a Judge of the Superior Court of the State of Washington, a court of record of general jurisdiction, and authorized to hear complaints and issue warrants under Section 5270 of the Revised Statutes of the United States, that R. C. JAMES, *alias* T. H. JOHNSON, has been guilty of and stands charged with the crime of ROBBERY, mentioned in said treaty, committed on the 12th day of December, 1924, in the City of Nanaimo, County of Victoria, Province of British Columbia and Dominion of Canada, and that said R. C. JAMES, *alias* T. H. JOHNSON, is now a fugitive from the justice of said Province of British Columbia, Dominion of Canada, and is now in King County, State of Washington, within the territorial jurisdiction of the United States of America.

Now, Therefore, you are hereby COMMANDED forthwith to apprehend the said R. C. JAMES, *alias* T. H. JOHNSON, and bring him before me, on the 12th day of January, 1925, to the end that the evidence of criminality may be heard and considered and [11] that upon the production of proper and

sufficient evidence of his guilt of said offense, he may be held for extradition to the said Dominion of Canada for said offense in accordance with the treaty and statutes in such cases made and provided.

GIVEN under my hand and official seal at Seattle, King County, Washington, this 9 day of Jan., A. D. 1925.

[Seal] MITCHELL GILLIAM,

Judge of the Superior Court of the State of Washington, a Court of Record and of General Jurisdiction, Acting as Extradition Commissioner Under and by Virtue of the Laws of the United States. [12]

EXHIBIT "C."

Before CHARLES HERBERT BEEVOR-POTTS,

Police Magistrate in and for the City of Nanaimo, in the County of Nanaimo, Province of British Columbia.

Nanaimo, B. C., Canada,
Friday, 2nd January, 1924.

Canada,
Province of British Columbia,
County of Nanaimo, to wit:

REX

vs.

T. H. JOHNSON (*alias* R. C. JAMES).

Mr. A. M. JOHNSON, K. C., for the Prosecution.

Mr. HARRY LANGLEY, sworn as Stenographer.

Mr. JOHNSON.—Your Worship, this is a proceeding under the Extradition Act, in the King v. T. H. Johnson (*alias* R. C. James). These proceedings are taken pursuant to the Extradition Act, being one of the Statutes of the Dominion of Canada, and taken for the purpose of extraditing the said T. H. Johnson (*alias* R. C. James) from the United States of America, upon the Information and complaint of John Shirass, Chief Constable of the City of Nanaimo, and sworn at the City of Victoria, British Columbia, on the 19th day of December, 1924, before J. H. McMullen, Justice of the Peace in and for the Province of British Columbia, and will be hereafter referred to in these proceedings as the matter of Rex vs. T. H. Johnson.

The Information and Complaint relates to an offense committed by the said T. H. Johnson, and others, at the City of Nanaimo, in the Province of British Columbia, in the Dominion of Canada, [13] on the 12th day of December, A. D. 1924, wherein and when the said T. H. Johnson, with others, then being armed with a certain offensive weapon, to wit: a revolver, did with and by means of violence then and there used by him the said T. H. Johnson to Robert Husband, accountant then in charge of the Royal Bank of Canada, at Nanaimo aforesaid, to prevent resistance, violently

stole in the presence of the said Robert Husband and against the will of the said Robert Husband, the sum of Forty-two Thousand Dollars, the property of the Royal Bank of Canada.

I will first call John Shirass.

JOHN SHIRASS, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name? A. John Shirras.

Q. You are Chief Constable of the City of Nanaimo? A. Yes.

Q. You were such Chief Constable on the 12th day of December 1924? A. Yes.

Q. Did you lay an information against a man named T. H. Johnson, *alias* R. C. James, in these proceedings? A. I did.

Q. I produce original information, who is that signed by?

A. Signed by myself, and signed by J. H. McMullen, a Justice of the Peace for the Province of British Columbia.

Q. Before whom did you lay that information.

A. Before J. H. McMullen, Justice of the Peace for the Province of British Columbia.

Q. On what date?

A. On the 19th day of December, 1924.

Q. Do you know J. H. McMullen personally?

A. Yes.

Q. Where was this information taken out? [14]

A. At the City of Victoria, B. C.

(Testimony of John Shirass.)

Q. Before whom?

A. Before J. H. McMullen, a Justice of the Peace for the Province of British Columbia.

Q. Whose signature is signed to it as Justice of

A. My own.

Q. Whose signatire is signed to it as Justice of the Peace? A. The signature of J. H. McMullen.

Q. How do you know it is the signature of J. H. McMullen? A. I saw him sign it.

Q. Did you apply to J. H. McMullen, Justice of the Peace for a warrant for the apprehension of the said R. C. James? A. I did.

Q. Did he issue a warrant for the arrest of R. C. James, within named? A. Yes.

Q. The R. C. James now known as C. H. Johnson? A. Yes.

Q. Is that the warrant that was issued by the said J. H. McMullen? A. Yes.

Q. Did you see him sign it? A. I did.

Information herein mentioned marked Exhibit "1."

Warrant herein mentioned marked Exhibit "2."

(Witness aside.)

EDWARD ROLAND FOSTER, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name?

A. Edward Roland Foster.

(Testimony of Edward Roland Foster.)

Q. Where do you reside, Mr. Foster?

A. In Nanaimo. [15]

Q. What is your occupation?

A. Civil engineer and B. C. Land Surveyor.

Q. How long have you been carrying on your profession as a civil engineer?

A. Fifteen years.

Q. How long have you been a member of the B. C. Land Surveyors? A. Nine months.

Q. Nine months last past? A. Yes.

Q. Under instructions from Crown officials did you prepare a plan of the premises of the Royal Bank of Canada in Nanaimo, B. C.? A. I did.

Q. Is this a blue-print of your plan? (Exhibiting blue-print.) A. Yes.

(Blue-print marked Exhibit "3.")

Q. Will you be good enough to mark on that plan the names of the streets in the City of Nanaimo on which the premises of the Royal Bank of Canada are situated?

A. (Indicates Commercial Street and Bastion street.)

Foster—Page 5.

Q. What are the two circles on the pavement marked on the south east corner of exhibit 3?

A. Telephone poles.

Q. Situate where?

A. At the edge of the curb in the sidewalk.

Q. In the cement pavement?

A. In the cement sidewalk.

Q. What does your plan represent Mr. Foster?

(Testimony of Edward Roland Foster.)

A. The ground floor plan of the Royal Bank of Canada in Nanaimo.

Q. What scale is drawn to?

A. Three-eighths of an inch to one foot. [16]

Witness aside.

JOHN W. GRAHAM, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name?

A. John W. Graham.

Q. Where do you reside? A. Malahat.

Q. Where is that from the city of Nanaimo?

A. Fifty-odd miles south from Nanaimo, and twenty miles north from Victoria.

Q. Were you in the city of Nanaimo, B. C., on the 12th day (of) December, 1924. A. I was.

Q. Did you have occasion on that day to visit the premises of the Royal Bank of Canada in Nanaimo? A. I did.

Q. At what time approximately?

A. Two thirty in the afternoon, or just before two-thirty,

Graham—Page 6

roughly speaking two-thirty.

Q. For what purpose did you go to the bank?

A. Private business with the manager.

Q. Banking business?

A. No it was not, on a private business matter;

(Testimony of John W. Graham.)

I went to discuss a private matter with the manager of the bank.

Q. Through which door of the bank did you enter?

A. The left hand door near the manager's office.

Q. Will you mark on exhibit 3? Mark where you entered.

A. (Indicates on plan.) [17]

Q. How far did you get inside?

A. I really was not clear of the swing door; just opened the swing door on the inside going in.

Q. Did you enter on the left hand side?

A. I entered at the point market on exhibit 3, as G–1.

Q. You were directed by someone in the bank to go somewhere, were you not. A. To back up.

Q. Where did you back up to?

A. I backed up to the middle of the floor opposite. This is the first teller's cage; opposite this cage here, up to the centre.

Q. Mark that with a dotted circle where you were told to back to.

A. As near as I can judge, about the middle—halfway between.

Q. Mark that G–2. How long did you stay at point G–2?

A. Not very long. There was another man took hold of me then and told me to back up to position G–3.

Q. Mark with a circle and dot.

(Testimony of John W. Graham.)

Graham—Page 7

A. Yes.

Q. Could you identify from a photograph the man who told you to back up from point G–2 to point G–3? A. Yes.

Q. I show you a photograph.

A. I recognize that as the man that backed me from point G–2 to point G–3.

Mr. JOHNSON.—I tender that as exhibit 4.

(Photograph of T. H. Johnson, *alias* R. C. James, marked Exhibit "4.")

Q. That man is now known as—what do you know him as now?

A. Only by information here; I know him as Johnson.

Q. How big a man was he?

A. He was a large-sied man, probably two hundred pounds—one [18] ninety to two hundred poungs; might be more; he wouldn't be any less.

Q. And height?

A. Six feet anyway, I should say.

Q. Did you notice anything about his dress or appearance—how was he dressed?

A. He was dressed in an ordinary suit of clothes. He had a long overcoat on.

Q. Did you notice his hat?

A. Yes, he had a hat, it would be a brown hat I should think.

Q. What shape?

A. You might say, a soft Fedora hat; as a matter of fact, like I wear myself.

(Testimony of John W. Graham.)

Q. Can you fix the hour time or the hour when you were backed from position G–2 to position G–3; how many minutes had you been in the bank before you got to the position G–3?

Graham—Page 8.

A. It wouldn't be more than half a minute. It was pretty quick.

Q. Did you notice anything in the hands of the man whose photograph you have identify on exhibit 4? A. I noticed two guns.

Q. Where? A. In his hand.

Q. One gun in each hand? A. Yes.

Q. How long did you remain at point G–3 approximately?

A. Well I was there for twenty-five minutes.

Q. Did you have occasion to observe the man you have identified and described as having two guns in his hands?

A. Yes, he was directly in front of me. In fact I didn't have anything else to look at; I was staring at him all the time.

Q. During the time you were staring at him, where were the guns? A. In his hands. [19]

Q. What was he doing, if anything, with those guns during that time?

A. His arms were rigid; he was moving them slightly.

Q. In which direction were the guns pointed?

A. Pointed towards me.

(Testimony of John W. Graham.)

Q. Did you have any conversation with this man that had the two guns pointed towards you?

A. Yes.

Q. What was that conversation?

A. Do you mean me to tell in exact words?

Q. No, the purport of the conversation.

A. I asked *me* what he was trying to, in a friendly way.

Q. Did he make any reply?

Graham—Page 9

A. "You keep quiet."

Q. Anything else?

A. I says, "I know." Then he spoke again and he said, "It is a dirty day for a job like this, but we need the money."

Witness aside.

JOHN McGUFFIE, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name?

A. John C. McGuffie.

Q. Where do you reside?

A. 425 Vancouver Avenue, Nanaimo, B. C.

Q. What is your occupation?

A. Accountant for Malkin, Pearson Co., Ltd.

Q. Where were you on the 12th of December last —where were you residing? A. In Nanaimo.

Q. Did you have occasion to visit the premises of the Royal Bank of Canada in Nanaimo on the 12th day of December last? A. I did.

(Testimony of John McGuffie.)

Q. At what time in the day? [20]

A. About 2.45 or 2:40 P. M.

Q. In the afternoon? A. Yes.

Q. For what purpose did you go to the bank?

A. For the purpose of making a deposit for my firm.

McGuffie—Page 10

Q. Which door of the bank premises did you enter?

A. The left hand door going in from the street.

Q. Will you mark on exhibit 3 where you entered?

A. (Indicates position on exhibit 3.)

Q. Will you mark on exhibit 3 where you stood in the bank after you entered.

A. I was walking in through the inside door, and I noticed a number of people standing up at the west end of the bank facing towards me.

Q. Mark about where you were.

A. I reached a point just about here. (Indicates on plan.)

Q. A circle, cross marked McG–1. What took place when you got to the point marked McG–1?

A. A hand was placed on my shoulder, and I was turned forcibly around, and I found myself confronting a man with a gun in each hand.

Q. I produce to you a photograph marked in these proceedings as exhibit 4 and ask you if you can identify that photograph.

A. Yes, I positively identify that as Johnson.

Q. And as what in relation to the evidence you have given just now?

(Testimony of John McGuffie.)

A. As the man who had the two guns, one in each hand, and who turned me forcibly round at that point.

Q. What did you do after he had turned you around?

A. He began to feel me all over, and then ordered me to turn around again with my back towards him, and he continued to feel in my pockets on the outside of my coat.

Q. What were you compelled to do after that? [21]

McGuffie—Page 11

A. He then ordered me to continue moving on towards the west end of the bank.

Q. Where did you take up your stand when you reached there?

A. I had only turned two or three steps when some man inside of the bank partition said something to Johnson as to me being the man *the* were waiting for.

Q. He took you for whom?

A. The manager of the Royal Bank of Canada. Johnson then asked me if I was the manager of the bank and I said no. *He* confederate then said something else to him and he insisted that I was the manager of the bank, and I told him I was not. I then heard his confederate ask him—

Q. In consequence of what some person said to this man—

A. In consequence of what his confederate said, Johnson asked me where I was from, and my reply

(Testimony of John McGuffie.)

was, from the Library. Johnson further asked me what my name was, and I replied McGuffie. A lady on my left side *corrobated* this statement to Johnson.

Q. Where were you at the time this conversation took place?

A. Between—halfway down between here.

Q. Will you mark that spot where the conversation took place? A. (Indicates position.)

Q. At circle cross McG–2 is where the conversation took place with Johnson? A. Yes.

Q. Where did you go from point marked McG–2 on exhibit 3?

A. To the far west end of the bank of the floor premises.

Q. Why did you go down to the west end of the floor premises? A. To joint the other people.

[22] McGuffie—No. 12

Q. Why?

A. Johnson told me to continue moving.

Q. In consequence of that direction, what did you do?

A. I continued and went in the direction where the other people were standing.

Q. Will you mark the point where you were when you got to the west end of the bank?

A. (Indicates position on plan.)

Q. A circle, cross, McG–3 is the point you stood?

A. Yes.

Q. Just right against what?

(Testimony of John McGuffie.)

A. The west partition, called the savings ledger counter.

Q. How long did you stay at point McG–3?

A. Until about 2:55 P. M.

Q. When what happened?

A. Johnson left the bank and entered the car at the entrance to the bank.

Q. Did you see him do that? A. Yes.

Q. As Johnson left the bank where did you go from point Mark McG–3? *A.* And noticed what?

A. Noticed the car drive off.

Q. What car?

A. The car that Johnson had entered.

Q. What kind of car was it? A. Motor-car.

Q. You noticed Johnson enter a waiting motor-car? A. Yes.

Q. Which stood where?

A. Which stood opposite the left entrance to the bank.

Q. Close to the curb? [23] A. Yes.

Q. You saw him enter that car? A. Yes.

Q. And you saw the car move off? A. Yes.

McGuffie—Page 13

Witness aside.

WINNEFRED ELSIE COOK, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is you full name?

A. Winnifred Elsie Cook.

(Testimony of Winnefred Elsie Cook.)

Q. Are you a married woman? A. Yes.

Q. Residing in Nanaimo, B. C. A. Yes.

Q. And were you residing here on the 12th December last 1924? A. Yes.

Q. Had you occasion on that day to enter the premises of the Royal Bank of Canada in Nanimo?

A. Yes.

Q. For what purpose?

A. To get a cheque cashed.

Q. About what time *dod* you enter the bank?

A. At twenty minutes to three.

Q. Which door did you enter from?

A. The left hand door.

Q. How far did you get in the bank premises?

A. Right back, the desk near the Savings, the wicket before you get to the Savings. I got just about here (indicating).

Q. We will mark that with a dot and circle C–1. That is [24]
the position you reached?

Cook—Page 14

A. Yes.

Q. Then what happened to you?

A. I walked straight in, neither looking to the right or left, and as I walked up I noticed several people standing, and I enquired why there *wasen't* anyone to wait on us.

Q. That was when you got to position C–1?

A. Yes.

Q. The position that you refer to was standing away from point C–1?

(Testimony of Winnefred Elsie Cook.)

A. Standing right at the teller's wicket.

Q. Near the teller's cage? A. Yes.

Q. And at this counter? A. Yes.

Q. At the counter at the west end of the building?

A. Yes.

Q. And who did you make that enquire of?

A. *Off* another woman who was standing there.

Q. Was there anyone in the cage immediately to the left of point C–1 when you got there?

A. I didn't notice.

Q. What did you next notice?

A. In consequence of what I learned I didn't make any more inquiries.

Q. Did you see anybody in the bank that afternoon that you have since been asked to recognize?

A. Yes.

Q. I show you exhibit number 4 in the case of the King against Watson, and ask you if you recognize that photograph?

A. I recognize that as the big man standing in the bank. [25]

Cook—Page 15

Q. Will you mark on exhibit 3 where the man you have just identified was standing when you were at point C–1. Where was this man standing?

A. He was standing down there. (Indicates.)

Q. Mark with a circle, C–2. That is where you say this big chap was standing at C–2? A. Yes.

Q. Did you notice whether he had anything in his hands when he was at point C–2?

A. Yes, he had a gun in each hand.

(Testimony of Winnefred Elsie Cook.)

Q. You were called down to Seattle in the United States, and some days after the 12th of December, 1924, to see if you could identify any of the persons concerned in the robbery of the Royal Bank of Canada on the 12th December last? A. Yes.

Q. Did you identify any of the persons that were in custody in Seattle when you were called there?

A. Yes.

Q. Who did you identify?

A. I identified Johnson.

Q. The man who photograph is marked in these proceedings of Rex vs. Johnson as Exhibit 4?

A. Yes.

(Witness aside.)

ROBERT HUSBAND, a witness for the prosecution, being duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name?

A. Robert Husband.

Q. Where do you reside?

Husband—Page 16 [26]

A. 107 Victoria Road, Nanaimo, B. C.

Q. Where were you residing on the 12th December last past? A. The same place.

A. Accountant at the Royal Bank of Canada in Nanaimo aforesaid.

Q. What was your occupation then and now?

Q. I produce to you a plan in the case of the King against Johnson, marked Exhibit 3 and ask you what it is?

(Testimony of Robert Husband.)

A. A plan of the Royal Bank of Canada.

Q. Will you mark on Exhibit 3 in the case of Rex vs. Johnson the various compartments or offices of the bank staff there in the Royal Bank of Canada as it was in the Royal Bank of Canada on December 12, 1924.

A. This is the manager's office; this is my own desk:

Q. Mark it "Accountant's desk."

A. (Indicates on plan.)

Q. Indicate on the plan the position of number one teller.

A. (Indicates position of number one teller; also number two teller, Savings ledgers.) This is number three cage.

Q. Teller's cage?

A. Yes. Number four teller's cage, customers room.

Q. There are three oblong places in the center of the floor space?

A. Customers desks in the center of the floor.

Q. Were you in the bank premises on the afternoon of the December 12th, 1924? A. Yes.

Q. Who was in charge of the bank at that time and place? A. I was.

Q. Where was the manager of the bank at that time? A. He was out of the premises.

Husband—Page 17

Q. Where were you standing on the afternoon of the 12th December, 1924 at about 2:30?

A. At my own desk.

(Testimony of Robert Husband.)

Q. Marked on Exhibit 3 as "Accountant's desk"?

[27] A. Yes.

Q. From there where did you proceed?

A. I was standing behind the first teller's cage.

Q. Then what happened?

A. I heard a noise of some men coming into the bank.

Q. Will you mark on Exhibit 3 the spot at the time you heard that noise? A. Yes. (Indicates.)

Q. Marked with a dot and circle H–1?

A. Yes.

Q. After you heard that noise what took place?

A. I looked around and saw a man walking down in front of my desk.

Q. Was he armed or unarmed?

A. I couldn't say.

Q. What took place after you noticed that man?

A. At the same time there was another man came through the swing door adjoining the manager's office on the west.

Q. Where did he proceed?

A. He came right up to me at point H–1.

Q. What took place then and there?

A. He asked me to take my hands down, and to turn around.

Q. Had you your hands up?

A. I had them up.

Q. For what reason?

A. This fellow in front had said something about sticking them up.

(Testimony of Robert Husband.)

Husband—Page 18

Q. And you obeyed that instruction? A. Yes.

Q. And the man told you to put your hands down and you did so? A. Turned around.

Q. What did you do in consequence of that direction?

A. I walked from point H–1 in front of the vault.

Q. Just mark the vault with the word "Vault."

A. At the west end of the bank premises. (Indicates.)

Q. Will you mark the spot where you walked to under instruction as H–2? [28]

A. (Indicates on plan.)

Q. What took place when you got to that spot?

A. He told me to lie down.

Q. And you laid down?

A. Yes. In about half a minute or so he came up to me and gave me a nudge and told me to look up, and when I looked up he said you are the man; come inside here.

Q. Meaning where?

A. Into the vault, "And open up this safe."

Q. What did you tell him?

A. I told him I couldn't open it up, as it took the manager and I to open it up.

Q. And as a consequence the safe was not opened up?

A. I opened up the safe, but not the inside doors.

Q. Was any money taken from the Royal Bank of Canada in Nanaimo that afternoon? A. Yes.

Q. The property of the bank? A. Yes.

(Testimony of Robert Husband.)

Q. Approximately how much?.

Husband—Page 19
Stephenson.

A. Approximately $42,000.

Q. From where?

A. Cages one, two and four.

Q. And those monies were taken by means of violence, as you have described? A. Yes.

Q. And against your wish and will? A. Yes.

Q. When you were directed to proceed from point H–1 on Exhibit 3 to point H–2, how did you go?

A. I went with him following me up, prodding me on the back. [29]

Q. Do you know what he prodded you with?

A. I don't know.

Q. What did it feel like?

A. I imagined it was two guns.

(Witness aside.)

ALBERT THOMAS STEPHENSON, a witness for the prosecution, being first duly sworn, testified as follows:

Direct Examination by Mr. JOHNSON.

Q. What is your full name?

A. Albert Thomas Stephenson.

Q. Where do you reside? A. City of Nanaimo.

Q. What is your occupation?

A. B. C. Police Force.

Q. You are a member of the B. C. Police Force?

A. Yes.

Q. Occupying what position?

(Testimony of Albert Thomas Stephenson.)

A. Staff Sergeant.

Q. Where were you on the 12th December, 1924?

A. In the city of Nanaimo.

Q. Holding what position?

Stephenson—Page 20

A. Staff Sergeant.

Q. Who is the Attorney-General of British Columbia? A. The Hon. A. M. Manson.

Q. I produce to you a written authority from the Hon. A. M. Manson, Attorney-General of British Columbia under date of December, 30, 1924, authorizing and directing you to proceed to the city of Seattle, in the State of Washington, United States of America, and there prosecute the necessary proceedings against R. C. James, for his extradition to British Columbia. [30] A. Yes.

Q. You now know Mr. Stephenson, that the R. C. James mentioned in that letter of authority is one J. H. Johnson in these proceedings? A. Yes.

Q. And referred to in the proceedings of Rex vs. Johnson? A. Yes.

Q. Do you know the Attorney-General's signature? A. Yes.

Q. Did you see him sign that letter of authority to you? A. Idid.

Q. And the said R. C. James, now known as J. H. Johnson is charged with robbery with violence on the 12th day of December, 1924, at the city of Nanaimo, aforesaid in the Province of British Columbia? A. Yes.

(Testimony of Albert Thomas Stephenson.)

(Letter of authority above referred to marked Exhibit "5.")

Q. Do you know whether extradition proceedings have been taken for the extradition of Johnson from the city of Seattle, in the United States of America by the Hon. Attorney-General of British Columbia?

Stephenson—Page 21

A. They have.

(Witness aside.)

Mr. JOHNSON.—I intend to prove the Criminal Law of Canada before the Extradition Judge in the city of Seattle. That will be all the evidence before your Worship in the case of Rex vs. Johnson.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

HARRY LANGLEY,
Sworn Stenographer, and Deputy Official Reporter. [31]

REX
vs.
T. H. JOHNSON (*alias* R. C. JAMES).

Canada,
Province of British Columbia,
County of Nanaimo.—s.

In the Matter of T. H. JOHNSON, *alias* R. C. JAMES, and in the Matter of the Extradition Act, and in the Matter of REX vs. T. H. JOHNSON, *alias* R. C. JAMES.

I, Harry Langley, of the City of Victoria, in the

Province of British Columbia, Dominion of Canada, Deputy Official Stenographer make oath and say as follows:

(1) That I am a Deputy Official Stenographer of the Victoria Judicial District, and that I am the stenographer appointed by Charles Herbert Beevor-Potts, Police Magistrate in and for the City of Nanaimo, in the Province of British Columbia, Dominion of Canada, to report the evidence in this case.

(2) That I was duly sworn as such stenographer by the said Charles Herbert Beevor-Potts before the taking of the said evidence.

(3) That the evidence hereto attached is a true and correct report of the proceedings and evidence taken at the hearing of the said case.

HARRY LANGLEY,

Sworn at Nanimo in the Province of British Columbia, this fifth day of January, 1925.

_____,

Police Magistrate in and for the City of Nanaimo, in the County of Nanaimo, in the Province of British Columbia, Dominion of Canada. [32]

REX

vs.

T. H. JOHNSON (*alias* R. C. JAMES).

Canada,
Province of British Columbia,
County of Nanaimo.

In the Matter of T. H. JOHNSON, *alias* R. C. JAMES, and in the Matter of the Extradition Act, and in the Matter of REX vs. T. H. JOHNSON, *alias* R. C. JAMES.

I, Charles Herbert Beevor-Potts, Police Magistrate in and for the City of Nanaimo, in the County of Nanaimo, in the Province of British Columbia, Dominion of Canada, being duly sworn, make oath and say:

(1) That I am Police Magistrate in and for the City of Nanaimo, Province of British Columbia, Dominion of Canada.

(2) That the foregoing, each page of which is signed by me is a true and correct copy and transcription of the evidence given before me on the 2d day of January, A. D. 1925, in the above case.

(3) That the stenographer, Harry Langley, was duly sworn by me before taking the said evidence.

_____,
Police Magistrate in and for the City of Nanaimo, Province of British Columbia.

Sworn at Nanaimo, in the Province of British Columbia, Dominion of Canada, this fifth day of January, A. D. 1925.

_____,
A Commissioner for Taking Affidavits in and for the Province of British Columbia. [33]

EXHIBIT "D."

In the Superior Court of the State of Washington.

Before the Honorable MITCHEL J. GILLIAM, Judge of the Said Superior Court Acting as Extradition Magistrate Under and by Virtue of Section 5270 of the Revised Statutes of the United States.

No. 179,090.

In the Matter of the Extradition of R. C. JAMES, *alias* T. H. JOHNSON.

COMMITMENT.

The above-entitled matter having come on for hearing before me, MITCHELL GILLIAM, a Judge of the Superior Court of the State of Washington, on the 12th and 15th days of January, 1925, at Seattle, King County, State of Washington; and

The said Superior Court being a Court of Record of General Jurisdiction of the State of Washington, one of the States of the United States; and

I, the said MITCHELL GILLIAM, acting as Extradition Magistrate to hear evidence of the criminality of said R. C. JAMES *alias* T. H. JOHNSON, in the above-entitled matter under and by virtue of Section 5270 of the Revised Statutes of the United States; and

It appearing that a complaint under oath was heretofore on the 9th day of January, 1925, made and filed before me at Seattle aforesaid, by BERT C.

ROSS, charging that the said R. C. JAMES, *alias* T. H. JOHNSON, had committed the crime of ROBBERY on the 12th day of December, 1924, at the City of Nanaimo in the Province of British Columbia, Dominion of Canada; and

It further appearing that said BERT C. ROSS in making [34] said complaint was acting for and on behalf of the Dominion of Canada, being duly authorized so to do, and that this is an extradition proceeding promoted by the Government of the Dominion of Canada; and

It further appearing that the said R. C. JAMES, *alias* T. H. JOHNSON, was duly arrested in King County, State of Washington, on a warrant issued by me in the said MITCHELL GILLIAM, acting as aforesaid; and

The said complaint having been read to the said R. C. JAMES, *alias* T. H. JOHNSON, and the said R. C. JAMES, *alias,* T. H. JOHNSON, appearing at all times during the hearing in person and being represented by counsel JOHN F. DORE; and

I, the said MITCHELL GILLIAM aforesaid, having heard the sworn testimony of witnesses and having received in evidence other proofs offered on behalf of the Dominion of Canada, and

It appearing that the crime charged against the said R. C. JAMES, *alias* T. H. JOHNSON, is the crime of robbery mentioned in and extraditable under the treaty of extradition now existing and in force between the United States of America and the

Kingdom of Great Britain, the provisions of which treaty apply to the Dominion of Canada, one of His Majesty's British Dominions beyond the seas; and

It further appearing that the said R. C. JAMES, *alias* T. H. JOHNSON, is the person accused of said offense in the Dominion of Canada; that the evidence heard and considered by me would, under the laws of the State of Washington and the United States justify the apprehension and commitment for trial of said R. C. JAMES, *alias* T. H. JOHNSON, had the crime aforesaid been committed in the STATE OF WASHINGTON, and that said evidence sustains the said charge, and that there is probable cause for holding the accused R. C. JAMES, *alias* T. H. JOHNSON, for trial— [35]

Now, therefore, it is hereby ORDERED, ADJUDGED, and DECREED that the said R. C. JAMES, *alias* T. H. JOHNSON, be, and he is, hereby remanded to the County Jail of King County, State of Washington, there to remain until delivered up, pursuant to the requisition of the proper authorities of the Dominion of Canada, in accordance with the provisions of the existing extradition treaty between the United States and Great Britain, and the laws of the United States.

Done this 15th day of January, 1925.

_____,

Judge of the Superior Court of the State of Washington, a Court of Record of General Jurisdiction, Acting Herein Under and by Virtue of Section 5270 of the Revised Statutes of the United States as Extra-Magistrate.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 18, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [36]

United States District Court, Western District of Washington, Northern Division.

No. 9,296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus and for a Writ of Certiorari.

ORDER TO SHOW CAUSE.

This matter coming on regularly for hearing upon the petition of T. H. Johnson for a writ of habeas corpus, the said petitioner appearing by his attorneys, John J. Sullivan, John F. Dore and V. G. Frost; and the Court having read and filed said petition, wherein it is alleged that said petitioner, T. H. Johnson, is illegally restrained of his liberty at the County Jail, in the City of Seattle, County of King, State of Washington, by Matt Starwich, Sheriff of said King County, and good cause appearing therefor,—

It is ORDERED AND ADJUDGED that the said Matt Starwich, Sheriff as aforesaid, be and he hereby is commanded to show cause, if any he have, before this court, on the 21st day of February, 1925, at 9:30 o'clock in the forenoon of said day, or as soon thereafter as the same can be heard, why a writ

of habeas corpus should not issue herein, as prayed for, and the said petitioner restored to his liberty.

And it is further ORDERED that a copy of this order, together with a copy of said petition, be served upon the said Matt Starwich, Sheriff as aforesaid, and upon the United States District Attorney.

Done in open court, this 18 day of February, 1925.

JEREMIAH NETERER,
Judge. [37]

[Endorsed]: (Order to Show Cause.) Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 18, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Matt Starwich, Sheriff of King County, by handing to and leaving a true and correct copy thereof with him personally at Seattle, in said District, on the eighteenth day of February, A. D. 1925.

E. B. BENN,
U. S. Marshal.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [38]

In the United States District Court for the Western District of Washington, Northern Division.

9,296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus, and for a Writ of Certiorari.

HEARING ON WRIT.

Now on this 21st day of February, 1925, leave is granted to amend answer of respondent by attaching thereto and making a part thereof a copy of certain parts of the testimony taken at the hearing before the Extradition Commissioner, which copy is marked Exhibit "E" on the showing of the amended answer. The writ is denied.

Journal No. 13, page 174. [39]

United States District Court, Western District of Washington, Northern Division.

No. 9,296.

In the Matter of the Application of T. H. JOHNSON, for a Writ of Habeas Corpus.

ORDER TO DISMISS PETITION.

This matter coming on regularly to be heard upon the petition of the above named T. H. Johnson for a writ of habeas corpus, order to show cause, respondent's answer and respondent's demurrer and

motion to dismiss petition; and petitioner and respondent both appearing by their respective counsel, and the Court being fully advised in the premises,—

It is hereby ORDERED, ADJUDGED and DECREED that the order to show cause be discharged and that the petition for writ of habeas corpus be and the same hereby is denied.

Done in open court, this 25 day of February, 1925.

JEREMIAH NETERER,
Judge.

O. K.—BERT C. ROSS,
Atty. for Respondent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 25, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [40]

United States District Court, Western District of Washington, Northern Division.

No. 9,296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

PETITION FOR ORDER ALLOWING APPEAL.

The above-named petitioner, T. H. Johnson, feeling himself aggrieved by the order, judgment and decision of this Court in discharging the rule to show cause issued herein and in denying petitioner's ap-

plication for a writ of habeas corpus, made and entered on the 24th day of February, 1925; and having given, served and filed his notice of appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, now prays that his said appeal be allowed and that a transcript of the record of all proceedings and files upon which said order, judgment and decision was made and entered, duly authenticated, be duly transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

And petitioner prays that on account thereof his said appeal be allowed, and to correct the errors complained of, and to reverse and annul and set aside said order, judgment and decision, as aforesaid.

And petitioner states that he will, within the time allowed by law, file herein his assignment of errors alleged to have been committed in the above-entitled proceeding and intended to be urged by petitioner, as appellant, upon the presecution of said appeal.

JOHN J. SULLIVAN,
JOHN F. DORE,
V. G. FROST,
Attorneys for Petitioner. [41]

Acceptance of service of within petition acknowledged this 24 Feb., 1925.

PATTERSON & ROSS,
Attorney Resp.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 25, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [42]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 9,296.

In the Matter of the Application of T. H. JOHNSON, for a Writ of Habeas Corpus.

ASSIGNMENT OF ERRORS.

Comes now the above-named petitioner, and the appellant herein, Harry Stone, by his attorneys, John F. Dore and John J. Sullivan, and says:

That in the record and proceedings in this cause, and in the order and judgment entered herein on the 24th day of February, 1925, there is manifest error, in this, to wit:

I.

That the Court erred in ruling that Mitchell Gilliam, Judge of the Superior Court of the State of Washington, for King County, had jurisdiction of the subject matter of the proceeding in which he issued a warrant of arrest for the apprehension of petitioner, and upon which he based his warrant of commitment for the detention of petitioner.

II.

That the Court erred in ruling that the said Judge Gilliam had jurisdiction over the person of said petitioner in said proceeding.

III.

That the Court erred in refusing to hold that the warrant of arrest, under which petitioner was ap-

prehended and taken before said Judge in said proceeding, was invalid and void.

IV.

That the Court erred in refusing to hold that the Sheriff of King County, State of Washington, was not authorized by law to execute warrants of arrest in said proceedings held before said Judge [43] Gilliam.

V.

That the Court erred in discharging the rule to show cause issued herein.

VI.

That the Court erred in denying petitioner's application for a writ of habeas corpus.

VII.

That the Court erred in refusing to discharge the petitioner from custody.

VIII.

That the Court erred in making and entering its order and judgment discharging the rule to show cause and denying petitioner's application for a writ of habeas corpus.

IX.

That the Court erred in holding that the testimony taken in said proceeding before Judge Gilliam was sufficient to establish probable cause that petitioner is guilty of the crime charged.

JOHN J. SULLIVAN,
JOHN F. DORE,
V. G. FROST,
Attorneys for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 25, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [44]

United States District Court, Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

ORDER ALLOWING APPEAL.

This matter coming on for hearing upon the petition of the above-named petitioner for an order of this Court allowing his appeal herein, and it appearing to the Court that a notice of appeal from the order, judgment and decision of this Court, made and entered herein on the 24th day of February, 1925, has been filed herein and served upon Patterson & Ross, attorneys for respondent,

It is, therefore, ORDERED that such appeal be and the same hereby is allowed.

Done in open Court, this 25 day of February, 1925.

JEREMIAH NETERER,
Judge.

Acceptance of service of within order acknowledged this 24 Feb., 1925.

PATTERSON & ROSS,
Attorney Resp.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 25, 1925. Ed M. Lakin, Clerk. By S. M. H. Cook, Deputy. [45]

United States District Court, Western District of Washington, Northern Division.

No. 9226.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

NOTICE OF APPEAL.

To the Judge and Clerk of said Court, and to Patterson & Ross, Attorneys for Respondent:

You will hereby take notice that the above-named petitioner hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment entered herein on the 24th day of February, 1925, discharging the rule to show cause issued herein and denying petitioner's application for a writ of habeas corpus, as more fully appears from the assignment of errors filed herein.

Dated at Seattle, Washington, February 21, 1925.

JOHN J. SULLIVAN,
JOHN F. DORE,
V. G. FROST,
Attorneys for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Feb. 25, 1925. Ed. M. Lakin, Clerk, By S. M. H. Cook, Deputy.

Acceptance of service of within notice acknowledged this 24 of Feb. 1925.

PATTERSON & ROSS,
Attorney Resp. [46]

United States District Court, Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

APPEAL BOND FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS: That we, T. H. Johnson, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto Matt Starwich, Sheriff of King County, Washington, in the full and just sum of Two Hundred and Fifty Dollars, ($250), to be paid to the said Matt Starwich, Sheriff of King County, Washington, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents. Sealed with our seals and dated, this 17 day of March, 1925,

Whereas, on the 25 day of February, 1925, at the District Court of the United States for the Western District of Washington, Northern Division,

in the above-entitled matter, a judgment was rendered against the said T. H. Johnson, dismissing his petition for habeas corpus and remanding him into custody, and for costs, and the said T. H. Johnson having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the aforesaid suit;

Now, the condition of the above obligation is such that, if the said T. H. Johnson shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good, then [47] the above obligation to be void; otherwise to remain in full force and virtue.

[Seal]

T. H. JOHNSON, (Seal)
NATIONAL SURETY COMPANY,
By C. B. WHITE,
Attorney-in-fact.

Approved, March 18, 1925.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 18, 1925. Ed, M. Lakin, Clerk. By S. M. H. Cook, Deputy. [48]

In the District Court of the United States for the Western District of Washington, Northern Division.

Before the Honorable JEREMIAH NETERER, District Judge.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

ORDER ALLOWING TRANSMISSION OF ORIGINAL ANSWER.

This matter coming on to be heard upon the stipulation of respective counsel, on file herein, that dispensing with a copy thereof, the clerk of this court may transmit to the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal hereof the original return of the respondent to the order to show cause on file herein, together with all exhibits and documents therein referred to and made a part thereof, it is, therefore,

ORDERED that the Clerk of this court be and he is hereby authorized and directed to transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with the record upon the appeal herein, the original return of the respondent to the order to show cause issued herein, together with all exhibits and documents therein referred to and made a part thereof.

Done in open court this 4th day of April, 1925.

JEREMIAH NETERER,
Judge.

O. K.—PATTERSON & ROSS,
Atty. for Respondent. [49]

In the District Court of the United States for the Western District of Washington, Northern Division.

Before the Honorable JEREMIAH NETERER, District Judge.

No. 9296.

In the Matter of the Application of J. H. JOHNSON for a Writ of Habeas Corpus.

STIPULATION.

It is hereby stipulated and agreed by and between respective counsel herein, that, dispensing with a copy thereof, the Clerk of this court may transmit to the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal hereof, the original return of the respondent to the order to show cause on file herein, together with all exhibits and documents therein referred to and made a part thereof.

Dated this 25 day of March, 1925.

JOHN F. DORE,
JOHN J. SULLIVAN,
V. G. FROST.
Attorneys for Petitioner.

T. H. PATTERSON and
BERT C. ROSS,
Attorneys for Respondent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 4, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [50]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

ORDER EXTENDING TIME TO AND INCLUDING MAY 1, 1925, TO FILE RECORD ON APPEAL.

The Clerk of the above-entitled court having found that thirty days from the filing of the Citation in the above-entitled cause is not sufficient to prepare and transmit the record on appeal to the Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the time for filing the record on appeal in the United States

Circuit Court of Appeals be, and the same is hereby, extended to and including the 1st day of May, 1925.

Dated this 15th day of April, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1925. Ed M. Lakin, Clerk. By S. M. H. Cook, Deputy. [51]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-named Court:

You will please prepare typewritten transcript of the minute entry of the Clerk in the above-entitled Court, of oral order made by the Honorable Jeremiah Neterer in the above-entitled cause on the 21 day of February, 1925, allowing amendment of respondent's answer to show cause order. The above to be in addition to the papers requested in the praecipe filed by the petitioner.

PATTERSON & ROSS,
Attorneys for Respondent.

Copy received March 31, 1925.

JOHN F. DORE and
JOHN J. SULLIVAN,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 1, 1925. Ed M. Lakin, Clerk. By S. M. H. Cook, Deputy. [52]

United States District Court, Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare typewritten transcript of record in the above-entitled cause on appeal and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, comprising the following papers:

1. Petition for writ of habeas corpus.
2. Order to show cause thereon.
3. Answer to order to show cause.
4. Order denying writ.
5. Notice of appeal.
6. Petition for order allowing appeal.
7. Assignment of errors.
8. Order allowing appeal.

9. Appeal bond.
10. Citation.

JOHN F. DORE,
JOHN J. SULLIVAN,
V. G. FROST,
Attorneys for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 13, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [53]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus and for a Writ of Certiorari.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Ed. M. Lakin, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 53 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record

and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the appellant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

[54]

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return 118 folios at 15¢	$17.70
Certificate of Clerk to transcript of record 4 folios at 15¢	.60
Seal to said certificate	.20
Certificate of Clerk to original exhibits 2 folios at 15¢	.30
Seal to said certificate	.20
Total	$19.00

I hereby certify that the above cost for preparing and certifying record, amounting to $19.00, has been paid to my by attorney for appellant.

I further certify that I herewith transmit and attach the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 27th day of April, 1925.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [55]

United States District Court, Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON for a Writ of Habeas Corpus.

CITATION.

To Matt Starwich, Sheriff of King County, Washington, and to Patterson & Ross, His Attorneys, GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, in a proceeding therein entitled, "In the Matter of the Application of T. H. Johnson for a Writ of Habeas Corpus," numbered 9296, and show cause, if any there be, why the order and judgment of the

United States District Court for the Western District of Washington, Northern Division, in said appeal mentioned, should not be reversed, set aside and held for naught, and why speedy justice should not be done in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 18 day of March, 1925.

[Seal] JEREMIAH NETERER,
United States District Judge Presiding in said Western District of Washington, Northern Division.

Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 18, 1925.

ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy. [56]

Acceptance of service of within Citation acknowledged this 18 day of March, 1925.

PATTERSON & ROSS,
Attorney for Appellee. [57]

[Endorsed]: No. 4634. United States Circuit Court of Appeals for the Ninth Circuit. T. B. Johnson, Appellant, vs. Matt W. Starwich, as Sheriff of King County, State of Washington, Appellee. Transcript of Record. Upon Appeal from

the United States District Court for the Western District of Washington, Northern Division.

Filed July 13, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4634

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4634

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4634.

T. H. JOHNSON,

Appellant,

vs.

MATT STARWICH, as Sheriff of King County, State of Washington,

Appellee.

STIPULATION RE SUPPLEMENTAL TRANSCRIPT OF RECORD.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, Patterson & Ross, attorneys for appellee, and John J. Sullivan, F. C. Regan, John F. Dore and V. G. Frost, attorneys for appellant, that the Clerk of the above-entitled court may print as a supplemental transcript of the record in the above-entitled case the following:

1. The allegations contained in Paragraphs I to IX, inclusive, of appellee's answer to order to show cause; and, Exhibit "D," the commitment attached thereto.

2. Also that part of Exhibit "E" attached to said answer showing appellant's offer to prove by himself and other witnesses that appellant was not in British Columbia at the time the robbery of which he was accused was committed, and Judge

Gilliam's ruling on said offer permitting appellant to testify but denying the right to call other witnesses, and appellant's refusal to testify.

3. Also the testimony of the witnesses Archie Mainwaring Johnson and A. C. Rosenfeldt, as the same appears in Exhibit "E" attached to the answer to order to show cause.

JOHN J. SULLIVAN,
JOHN F. DORE,
V. G. FROST,
FRANK C. REAGAN,
Attorneys for Appellant.
T. H. PATTERSON and
BERT C. ROSS,
PATTERSON & ROSS,
Attorneys for Appellee.

[Endorsed]: No. 4634. United States Circuit Court of Appeals for the Ninth Circuit. Stipulation re Supplemental Transcript of Record. Filed Aug. 13, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9296.

In the Matter of the Application of T. H. JOHNSON, for a Writ of Habeas Corpus and for a Writ of Certiorari.

ANSWER OF RESPONDENT, SHERIFF OF KING COUNTY, STATE OF WASHINGTON, TO ORDER TO SHOW CAUSE.

COMES NOW the respondent, Matt Starwich, and for answer to the show cause order issued herein, shows and alleges as follows:

I.

That Mitchell Gilliam, hereinafter mentioned and referred to, is a Judge of a court of record of general jurisdiction, of the State of Washington, one of the States of the United States.

II.

That before the said Mitchell Gilliam, there was on the 9th day of January, 1925, made and filed a complaint under oath, a copy of which is attached hereto, marked Exhibit "A," and by this reference made a part hereof.

III.

That upon the filing of said complaint the said Mitchell Gilliam issued his warrant for the arrest of the said R. C. James, *alias* T. H. Johnson, mentioned in said complaint, which warrant is attached hereto, marked Exhibit "B," and by this reference made a part hereof.

IV.

That thereafter your respondent, under and by virtue of said warrant arrested the said R. C. James, *alias* T. H. Johnson, [39*] as shown by the return of your respondent on said warrant, a

*Page-number appearing at foot of page of original certified Supplemental Transcript of Record.

copy of which return is attached hereto, marked Exhibit "C," and by this reference made a part hereof.

V.

That thereafter on the 12th and 15th days of January, 1925, the said Mitchell Gilliam heard and considered evidence touching the criminality of said R. C. James, *alias* T. H. Johnson, with reference to the charge set forth and contained in the aforementioned complaint and warrant.

VI.

That the said Mitchell Gilliam deemed the evidence so heard and considered by him sufficient to sustain the charge in said complaint contained, under the terms of the extradition treaty existing between the United States and the Kingdom of Great Britain, which said treaty applies to the Dominion of Canada, and issued his warrant of commitment, remanding the said R. C. James, *alias* T. H. Johnson, to the county jail of King County, a copy of which order of commitment is attached hereto marked Exhibit "D," and by this reference made a part hereof.

VII.

That your respondent further alleges that there was evidence received and considered by the said Mitchell Gilliam, acting as Extradition Commissioner which said evidence is not set forth in the petition of the petitioner herein. That respondent further denies the allegation in Paragraph Four (4) of the petitioner's petition herein wherein it is alleged that the said Mitchell Gilliam, sitting as

Extradition Commissioner, refused to allow the petitioner to produce any testimony in said petitioner's own behalf. [40]

VIII.

That your respondent is informed and believes and therefore states the fact to be, that the said Mitchell Gilliam, referred to in the petition of the petitioner herein, did certify to the Secretary of State of the United States the evidence received by him in the matter of the extradition of R. C. James, *alias* T. H. Johnson, on the 3d day of February, 1925, as he was required by the laws of the United States to do, and has at this time no control over the record in the said matter.

IX.

That your respondent now holds in custody the said petitioner, R. C. James, *alias* T. H. Johnson, under and by virtue of the authority of the said commitment issued as herein set forth.

WHEREFORE, having fully answered, your respondent prays that petition of the petitioner herein be denied.

PATTERSON & ROSS,
Attorneys for Respondent.

Office & Post Office Address:
Patterson & Ross
806 Dexter Horton Bldg.,
Seattle, Washington, U. S. A. [41]

EXHIBIT "D" TO AMENDED COMPLAINT—COMMITMENT.

In the Superior Court of the State of Washington.

Before the Honorable MITCHELL GILLIAM
Judge of the Said Superior Court Acting as Extradition Magistrate Under and by Virtue of Section 5270 of the Revised Statutes of the United States.

No. 179,090.

In the Matter of the Extradition of R. C. JAMES, *alias* T. H. JOHNSON.

The above-entitled matter having come on for hearing before me, Mitchell Gilliam, a Judge of the Superior Court of the State of Washington, on the 12th and 15th days of January, 1925, at Seattle, King County, State of Washington, and,

The said Superior Court being a Court of Record of General Jurisdiction of the State of Washington, one of the States of the United States, and

I, said Mitchel Gilliam, acting as Extradition Magistrate to hear evidence of the criminality of said R. C. James, *alias* T. H. Johnson in the above-entitled matter under and by virtue of Section 5270 of the Revised Statutes of the United States, and

It appearing that a complaint under oath was heretofore on the 9th day of January, 1925, made and filed before me at Seattle aforesaid, by Bert C. Ross charging that the said R. C. James *alias* T. H. Johnson had committed the *rime* of [48]

ROBBERY on the 12th day of December, 1924, at the City of Nanaimo in the Province of British Columbia, Dominion of Canada, and

It further appearing that said Bert C. Ross in making said complaint was acting for and on behalf of the Dominion of Canada, being duly authorized so to do, and that this is an extradition proceeding promoted by the government of the Dominion of Canada, and

It further appearing that the said R. C. James, *alias* T. H. Johnson, was duly arrested in King County, State of Washington, on a warrant issued *be* me the said Mitchell Gilliam, acting as aforesaid, and

The said complaint having been read to the said R. C. James, *alias* T. H. Johnson, and the said R. C. James, *alias* T. H. Johnson, appearing at all times during the hearing in person and being represented by counsel John F. Dore, and

I, the said Mitchell Gilliam aforesaid, having heard the sworn testimony of witnesses and having received in evidence other proofs offered on behalf of the Dominion of Canada, and

It appearing that the crime charged against the said R. C. James, *alias* T. H. Johnson, is the crime of robbery mentioned in and extraditable under the treaty of extradition now existing and in force between the United States of America and the Kingdom of Great Britian, the provisions of which treaty apply to the Dominion of Canada, one of His Majesty's British Dominions beyond the seas, and

It further appearing that said R. C. James, *alias* T. H. Johnson, is the person accused of said offense in the Dominion of Canada; that the evidence heard and considered [49] by me, would, under the laws of the State of Washington and the United States, justify the apprehension and commitment for trial of said R. C. James, *alias* T. H. Johnson, had the crime aforesaid been committed in the State of Washington, and that said evidence sustains the said charge, and that there is probable cause for holding the accused R. C. James, *alias* T. H. Johnson, for trial,

Now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the said R. C. James, *alias* T. H. Johnson, be, and he is, hereby remanded to the County Jail of King County, State of Washington, there to remain until delivered up, pursuant to the requisition of the proper authorities of the Dominion of Canada, in accordance with the provisions of the existing extradition treaty between the United States and Great Britain, and the laws of the United States.

Done this 15th day of January, 1925.

[Seal] (Signed) MITCHELL GILLIAM,
Judge of the Superior Court of the State of Washington, a Court of Record of General Jurisdiction, Acting Herein Under and by Virtue of Section 5270 of the Revised Statutes of the United States as Extradition Magistrate. [50]

TESTIMONY OF A. C. ROSENFELDT, FOR PETITIONER.

A. C. ROSENFELDT, produced as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROSS.)

Q. State your name, please.

A. A. C. Rosenfeldt.

Q. What is your residence? [93—41]

A. Seattle, Washington.

Q. What, if any, official position do you hold in King County, State of Washington.

A. I am doing criminal identification work for King County, Bertillion system.

Q. That is, in the county jail?

A. Yes, sir, in the county jail.

Q. Under the employment of the Sheriff of King County, State of Washington? A. Yes, sir.

Q. What experience have you had in the business or art of photography? A. About ten years.

Q. What has been the nature of that work?

A. Commercial and criminal work.

Q. For whom have you been employed in the commercial photography?

A. I was at Lowman & Hanford's for a number of years.

Q. How long have you been in charge of the Bertillion Department of King County, Sheriff's office?

A. Year ago last November.

(Testimony of A. C. Rosenfeldt.)

Q. Mr. Rosenfeldt I direct your attention to a photograph which is annexed to and made a part of Petitioner's Exhibit "A" in this matter, and which is known in this record as Exhibit No. 4; I will ask you to look at that photograph and say whether or not you have ever seen that photograph or one like it before?

A. I took that photograph on December 23d, 1924.

Q. You took that photograph? A. Yes, sir.

[94—42]

Q. Of whom is that a photograph?

A. T. H. Johnson.

Q. Is that the same Johnson who sits at this defendant's table here? A. Yes, sir.

Q. Look at the facial features of T. H. Johnson, the accused in these proceedings, who is known in these proceedings as T. H. Johnson, *alias* R. C. James, and say whether or not the photograph which you have in your hand, and is annexed to Petitioner's Exhibit "A," which is Exhibit 4 in that proceeding, and say whether or not the photograph, Exhibit 4, is a fair representation of the facial features of T. H. Johnson, *alias* R. C. James?

A. Yes, sir.

Mr. ROSS.—You may take the witness.

Mr. DORE.—No cross-examination.

(Witness excused.)

Mr. ROSS.—I will call Mr. A. M. Johnson.

TESTIMONY OF A. M. JOHNSON, FOR PETITIONER.

A. M. JOHNSON, produced as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROSS.)

Q. State your name?

A. Archie Mainwaring Johnson.

Mr. ROSS.—I will ask that this document be marked Petitioner's [95—43] Exhibit "B" for identification.

(Document so marked.)

Q. Where do you reside, Mr. Johnson?

A. Victoria, British Columbia.

Q. What is your occupation?

A. Barrister-at-law.

Q. How long have you practiced that profession?

A. Over twenty-eight years.

Q. What experience have you had in practicing criminal law under the Criminal Code of the Dominion of Canada?

A. I have practiced both as prosecutor and as defendants' counsel and Deputy Attorney General of the Province of British Columbia for other four years, from 1917 to 1921.

Q. As such Deputy Attorney General what were your duties with reference to the enforcement of the Criminal Code of Canada so far as it pertains to and effects the Province of British Columbia?

(Testimony of A. M. Johnson.)

A. I have complete *complete* charge of all the prosecutions in behalf of the Crown.

Q. What official position do you hold with reference to this matter that is now pending in this court and in hearing here, to wit: the case of the King versus T. H. Johnson, *alias* R. C. James?

A. I am the Crown Prosecutor.

Q. You have been appointed by the Attorney General of British Columbia as Crown Prosecutor in this case? A. Yes, sir.

Q. When did that appointment occur?

A. On Friday the 12th day of December. There is no special appointment. I am Crown Prosecutor of the Attorney General's [96—44] department.

Q. When was your attention first called to this case, in your connection with it, when did your connection with this case originate?

A. Some time after three o'clock in the afternoon of the 12th of December, 1924.

Q. In your connection as Crown prosecutor in the case which is now on hearing here do you know when I was retained to represent your Government with reference to this matter that is now on hearing?

A. On the 12th of December, 1924.

Q. I ask you if you*r* are familiar with the signature of A. M. Manson? A. I am.

Q. Who is A. M. Manson?

A. Attorney General of the Province of British Columbia, chief law officer of that Province.

(Testimony of A. M. Johnson.)

Q. He is the chief law enforcement officer of that Province? A. Yes, sir.

Q. I will show you a letter *t*hich purports to bear the signature of the Honorable A. M. Manson, and ask you if that is the signature of Mr. Manson?

A. That is Mr. Manson's signature as Attorney General of the Province of British Columbia.

Mr. ROSS.—I offer Petitioner's Exhibit "B" in evidence, as Exhibit "B."

Mr. DORE.—No objection.

(Letter dated January 9th, 1925, received in evidence and marked Petitioner's Exhibit "B.")

Q. I will ask you briefly to state to the Court what is the law [97—45] of Canada with reference to the crime of robbery with violence?

A. The criminal laws of Canada were passed by the Federal Parliament and are administered in each of the Provinces by the Provincial authorities. The Criminal Code of Canada is the law governing crime and its punishment and extends, although enacted by the Dominion, extends to all of the nine Provinces of Canada, in the Criminal Code of Canada, Section 445 defines robbery as follows:

> "Criminal Code of Canada. Robbery and Extortion. 445. Robbery defining the act. Robbery is theft accompanied with violence o*f* threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen. (55 Vict., C. 295–397.)"

Q. Mr. Johnson, I will ask you to state briefly to

(Testimony of A. M. Johnson.)

his Honor what is the law of Canada with reference to accomplices in crime?

A. The Criminal Code of Canada draws no distinction between the principals and accessories before the fact. They are each treated as principal offenders, indicted and prosecuted as such. The Criminal Code of Canada, Section 69 provides as follows:

> "Parties to the offenses, 69. Every person is a party to and guilty of an offense who,—
>
> (A) Actually commits it; or
>
> (B) Does or omits an act for the purpose of aiding any person to commit the offense; or
>
> (C) Abets any person in the commission of the offense; or [98—46]
>
> (D) Counsels or procures any person to commit the offense.
>
> 2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offense committed by any one of them in the prosecution of such common purpose, the commission of which offense was, or ought to have been known to be a probable sequence of the prosecution of such common purpose."

Q. You are the same A. M. Johnson who conducted the proceedings before the Police Magistrate in Nanaimo, British Columbia on the 2d day of January, are you not? A. I am.

Q. Those are the depositions which have been read into the record in this matter? A. They are.

(Testimony of A. M. Johnson.)

Q. And you have heard the further testimony that has been given in this court to-day? A. I have.

Q. I will ask you to state whether or not in your opinion that evidence, that is the depositions that have been read into this record here to-day, the same being Petitioner's Exhibit "A," and the oral evidence that has been given, whether or not that would make, in your opinion a *prima facie* case of robbery with violence under the Criminal Code of Canada as against the defendant T. H. Johnson, *alias* R. C. James?

Mr. DORE.—I object to that as being incompetent, immaterial and irrelevant and calling for a conclusion. That is conclusively the Province of the Judge and commissioner trying [99—47] the case.

The COURT.—The objection is overruled.

Mr. DORE.—Note an exception.

The COURT.—Exception allowed.

A. The evidence and the depositions, and the oral evidence would if the case were being heard in Canada or any Province of Canada be sufficient to put the accused on his trial and justify the magistrate to commit him for trial.

Q. Will it constitute in your opinion, a *prima facie* case?

Mr. DORE.—I make the same objection.

The COURT.—Objection overruled, exception allowed.

A. It would constitute a *prima facie* case for that reasons.

(Testimony of A. M. Johnson.)

Mr. ROSS.—You may cross-examine.

Mr. DORE.—No cross-examination.

(Witness excused.)

Mr. ROSS.—The petitioner rests.

Mr. DORE.—I understood that your Honor made a ruling in another similar case on testimony tending to show that the defendant was at a place other than the situs of the crime at the time charged was inadmissible.

The COURT.—Yes, sir.

OFFER OF RESPONDENT THAT HE WAS NOT IN BRITISH COLUMBIA AT TIME OF ALLEGED ROBBERY, Etc.

Mr. DORE.—You understand that we make the same objections, and the Court will adhere to the same ruling?

The COURT.—Yes, sir.

Mr. DORE.—With the permission of the Court, for the purpose of this record, will I be permitted to make my offer and counsel may object to it?

The COURT.—Yes, sir. [100—48]

Mr. DORE.—The respondent by himself and by a number of witnesses offers, at this time, to prove by testimony under oath given in open court, that on December 11th, 12th and 13th, he was in the State of California, and that on the day alleged he was at no time in Nanaimo or any other place in British Columbia, being then in the State of California.

Mr. ROSS.—To which offer we object upon the

ground and for the reason that it is wholly incompetent, immaterial and irrelevant in this matter that is now pending before your Honor and for the reasons stated in the other case.

Mr. DORE.—The ruling of the Court is that this defendant, or these witnesses, will not be permitted to give any testimony such as is offered?

The COURT.—Yes.

Mr. DORE.—Note an exception.

The COURT.—Exception allowed. You mean the testimony of alibi?

Mr. DORE.—That they were at a place different in accordance with the offer that I made.

Mr. ROSS.—Do I understand that the offer includes the accused himself, that he is desirous to give testimony.

Mr. DORE.—The offer is just what it is.

Mr. ROSS.—Now, if the Court please, my objection goes to the testimony offered in behalf of the defendant by other witnesses. I think that the defendant in this sort of a proceeding, as a matter of right, or to himself, has a right to appear and give testimony under our statute, and I think that that is the only thing that he has a right to do in the way of a showing at this time. My objection does [101—49] not go as to the accused himself giving testimony.

The COURT.—I sustain the objection as to the other witnesses, but overrule it, do not sustain it, as to the respondent.

Mr. DORE.—That is, he won't be permitted to offer any other witnesses.

The COURT.—No.

Mr. DORE.—Note an exception.

The COURT.—Exception.

Mr. DORE.—The defense rests.

The COURT.—I will have to find that there is probable cause for the defendant, T. H. Johnson, being held for extradition.

Mr. ROSS.—And that the defendant be held to stand committed?

The COURT.—Yes, sir, the defendant will stand committed until further orders.

Mr. DORE.—Mr. Ross stipulates in this record that he is an American citizen and he is not a member of the bar and holds no office under the British Columbia government, except as shown in this testimony heretofore in the other cases, that Mr. Ross is an American citizen.

Mr. ROSS.—That I am an American citizen, that I am not an officer of the Canadian government, except as appears by my employment in this matter as has been shown in this record heretofore.

The COURT.—All right.

Mr. ROSS.—Let the record show that the accused was present when that stipulation was entered into.

The COURT.—The record may so show. [102—50]

No. 4634.

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT.

JOHN J. SULLIVAN,
JOHN F. DORE and
V. G. FROST,
Attorneys for Appellant.

1801-2 L. C. Smith Building,
Seattle, Washington.

GRETTNER-DIERS PRINTING COMPANY, SEATTLE

No. 4634.

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

On the 9th day of January, 1925, in a proceeding instituted in the Superior Court of the State of Washington, for King County, entitled as follows:

In the Superior Court of the State of Washington for King County.

Before the Honorable Mitchel Gilliam,

Judge, Acting as Extradition Commissioner.

No. 179090.

In the Matter of the Extradition of R. C. James, alias T. H. Johnson,

an amended complaint was filed, sworn to by one Bert C. Ross, in which it is alleged, in substance, that the above named James, alias Johnson, did on the 12th day of December, 1924, commit the crime of robbery at the City of Nanaimo, in the Province of British Columbia, and that said James, alias Johnson fled from British Columbia, and is in King County, State of Washington. (Tr. pp. 8, 9, 10 and 11.)

Whereupon a warrant of arrest, dated January 9, 1925, was issued, the caption of which is as follows:

In the Superior Court of the State of Washington for King County.

Before the Honorable Mitchell Gilliam,

Judge, Acting as Extradition Commissioner

In the Matter of the Extradition of R. C. James, alias T. H. Johnson.

This warrant is signed by Mitchell Gilliam,

"Judge of the Superior Court of the State of Washington, a Court of Record and of General Jurisdiction, Acting as Extradition Commissioner under and by virtue of the laws of the United States."

It is directed in the name of

"The State of Washington, to the Sheriff of King County," and commands him to apprehend said James, alias Johnson, and bring him before the above named Judge.

It is recited in the warrant that:

> " * * * complaint has been made before me, a Judge of the Superior Court of the State of Washington, a court of general jurisdiction, and authorized to hear complaints and issue warrants under Section 5270 of the Revised Statutes of the United States, that R. C. James, alias T. H. Johnson, has been guilty and stands charged with the crime of robbery, * * * committed on the 12th day of December, 1924, in the City of Nanaimo, County of Victoria, Province of British Columbia and Dominion of Canada." (Tr. pp. 11, 12, 13.)

This warrant was placed in the hands of the appellee, Sheriff of King County, State of Washington, and was by him executed by arresting the appellant and confining him in the King County jail, where he was kept in confinement until the 12th day of January, 1925, when he was taken by the court, judge and proceeding, is substantially the

same as in the complaint and warrant, in which commitment it is ordered that appellant be remanded to the King County jail, there to remain until delivered up, etc. (Tr. pp. 38, 39, 40.)

Under this commitment appellant was taken to and confined in said jail by said sheriff.

While so confined appellant applied to the United States District Court for the Western District of Washington, Northern Division, for a writ of habeas corpus. (Tr. p. 1, *et seq.*) Thereupon the court issued its order directed to the said sheriff, said sheriff before the judge issuing the warrant, whereupon testimony was taken in support of the facts alleged in said complaint, and thereafter, and on the 15th day of January, 1925, a commitment was issued by said judge, the caption of which, as to commanding him to show cause why a writ of habeas corpus should not be granted, as prayed for. (Tr. p. 41.) A return was made to the order to show cause, and a demurrer to the petition for the writ was filed by the sheriff. The matter being submitted to the court its order and judgment was made and entered discharging the rule to show cause and denying the petition for the writ, (Tr. p. 43) from which order and judgment appellant duly appealed to this court.

ARGUMENT.

There are two things, shown by the record, which stand out very prominently in this proceeding:

1. That the object of the proceeding was the extradition of this appellant to the Dominion of Canada, under the provisions of a treaty of extradition between the United States and Great Britain.

2. That it was instituted in the Superior Court of the State of Washington, and the process of the State of Washington, and its peace officer, was employed to apprehend the appellant.

Upon these facts we base the contention that the entire proceeding was *coram non judice.*

The State of Washington has no authority, and its courts have no jurisdiction, in proceedings for extradition under the provisions of a treaty between the United States and a foreign country.

In the case of *Holmes vs. Jennison,* 10 Law Ed. 579, the court, speaking of foreign extradition, says:

> "And it being conceded on all hands that the power has been granted to the federal government, it follows that it cannot be possessed by the States, because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government."

Hereafter, and under our first assignment of error, we will discuss the question whether a judge of a State court of record having general jurisdiction, has jurisdiction in a proceeding under a treaty of extradition with a foreign country. Assuming, at this stage, that he had such jurisdiction, the question is, can he exercise that jurisdiction through and by means of the process and officers of the State of Washington?

This involves the question as to whether Judge Gilliam acquired jurisdiction over the person of this appellant,and is covered by our second, third and fourth assignments of error:

II.

That the court erred in ruling that the said Judge Gilliam has jurisdiction over the person of said petitioner in said proceeding.

III.

That the court erred in refusing to hold that the warrant of arrest, under which petitioner was apprehended and taken before said judge in said proceeding, was invalid and void.

IV.

That the court erred in refusing to hold that the Sheriff of King County, State of Washington, was not authorized by law to execute warrants of arrest in said proceedings held before said Judge.

We quote that portion of Section 5270, of the U. S. Revised Statutes which is pertinent here:

> "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or a judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath charging any person found within the limits of any State, district or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered."

That the power conferred by this statute upon the specified officers is a *judicial power,* there is no doubt. In *re Metzger,* 17 Federal Cases, No. 9511, the court speaking of an extradition treaty, says:

> " * * * it is manifest that the provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country but by aid of *judicial authority.* Not only in the distribution of the powers of our government does it pertain to receive evidence and determine upon its sufficiency to arrest and commit for criminal offenses, but the prohibition in the constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a *judicial act.* * * * the government can only fulfill its engagement in this respect by the instrumentality of the *judicial tribunals.*" (Italics ours.)

There are not two different and distinct methods by which the officers specified in the statute may exercise the powers conferred upon them, dependent upon whether they be federal judges on the one hand, or judges of State courts on the other. The power conferred is a *federal judicial power,* in every instance, and by whatever judge it is exercised, to be exercised in exactly the same manner and by the same means, to-wit; by the use and employment of such *federal process as may be necessary to carry the power into effect.* The power of each of these officers being precisely the same, and to be exercised in precisely the same manner, the judge of a circuit or district court could as well issue a warrant of arrest in the name and by the authority of a State, and command that a peace officer of the State

execute it, as could the judge of a state court in the exercise of the same power. We contend, most emphatically, that none of these judges have the authority to invoke or employ the power and process of a State, and its peace officers, for the purpose of carrying into effect the powers vested in them by the statute. In every instance, we maintain, in which any of these judges attempt to exercise this power it should, and to be lawful, it must be, through the instrumentality of federal process. The warrant, which the statute empowers them to issue, should show on its face that it emanated by and under the authority of the United States; should be in its name, and should be directed to some officer authorized by its laws to execute warrants of arrest, *among which the sheriff of King County, State of Washington, is not included.* Under the federal procedure warrants of arrest are issued in the name of "The President of the United States of America," and are directed to a United States Marshal for service.

If it be true, as we contend, that in the exercise of the power conferred upon him by the statute, Judge Gilliam had no authority to issue a warrant under the authority and in the name of the State of Washington, and direct that it be executed by a

peace officer of that State, it follows, as a matter of law, that this warrant was void, and if that be true his aprpehension thereunder did not give Judge Gilliam jurisdiction over his person.

Whether or not this was a lawful warrant can, it occurs to us, be determined by a very simple test. As stated before, if Judge Gilliam, in the exercise of his powers under the statute, is authorized to issue a warrant of arrest such as this, it would follow that one of the judges of this court, in the exercise of the same power, could issue just such a warrant. If an officer, whose duty it is, under the law, to execute a warrant of arrest, or any other lawful process, refuses to do so it would constitute a contempt of court. Now, suppose a complaint, alleging the facts set forth in Section 5270 *supra,* was laid before one of the judges of this court, and a warrant issued such as this one, and the sheriff, to whom it was directed, refused to execute it, could he be punished for contempt of court? If he could not be it would be because the warrant was unauthorized by law, in other words, *because the warrant was void.*

It will not do to say that, regardless of the warrant, the party was actually before Judge Gilliam, and that fact would constitute jurisdiction

over his person. Unless he made a voluntary appearance, and the record shows that he did not, there is only one lawful way, under the statute, by which his appearance could be secured and jurisdiction over his person obtained, and that is by the issuance of a lawful warrant and his apprehension thereunder.

Our first assignment of error, which is:

That the court erred in ruling that Mitchell Gilliam, Judge of the Superior Court of the State of Washington, for King County, had jurisdiction over the subject matter of the proceeding in which he issued a warrant of arrest for the apprehension of petitioner, and upon which he based his warrant of commitment for the determination of petitioner, raises the question of jurisdiction over the subject matter, and this being a proceeding under a treaty for extradition between the United States and a foreign government, it is our contention that the provision of Section 5270 *supra,* conferring upon the judge of a state court a power which, in our discussion under assignments of error two, three and four, we have shown to be a federal judicial power, is obnoxious to the Constitution of the United States.

Sec. 1, Art. 2 of the Constitution, provides that:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * * "

Sec. 2, Art. 2, provides that:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * "

Our discussion of this point will be as brief as possible consistent with rendering our position intelligible. That position is:

That Congress has no power to vest federal judicial power in State courts, or judges of State courts, as such.

In Section 5270 *supra,* Congress has vested, what we have shown to be a *federal judicial power,* in "a judge of a court of record of general jurisdiction of any State." That Congress has the power to vest federal judicial power in any federal judge, or any competent person, such as a commissioner, whom the statute authorizes the federal judges to appoint, we do not question for a moment. But here the power is vested, not *in a person,* but *in a judicial officer.* The power is conferred upon the

judge of a State court, *as such,* and we can discern no distinction between conferring it upon a State Court, and the judge of a State court. And the proposition must be admitted, that if Congress has the power to vest a single federal judicial power in a State court, or the judge of a State court, as such, it has the power to vest every federal judicial power, with the exception of that which the Constitution vests exclusively in the Supreme Court, in State Courts, or the judges thereof. That Congress possesses no such power is about as well established as any question arising under the Constitution may well be. But why not? If Congress can vest *one federal judicial power* in a State Court, or one of its judges, why may it not vest them with *every federal judicial power,* not exclusively vested by the Constitution in the Supreme Court?

We have examined every reported case in the federal courts concerning extradition matters under treaties between the United States and foreign countries, and we remember but one in which the judge of a state court attempted to exercise the power conferred in Section 5270 *supra,* and in that case the question we are now presenting was not presented or discussed. We have been able to find no case in which it is held that Congress has the

power to vest State Courts, or the judges thereof, with federal judicial powers.

That this is beyond the power of Congress is laid down by the following text writers:

1 *Bailey on Jurisdiction,* Sec. 93, p. 73;
1 *Kent's Comm.* (14th Ed.) p. 395, *et seq;*
2 *Story on Const.,* Sec. 1754-5-6.

In *Houston vs. Moore,* 5 Law Ed. 25, Mr. Justice Washington said:

> "For I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any court except such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by exclusive jurisdiction of the federal courts."

Other cases in point are:

Martin vs. Hunter, 4 Law Ed. 97;
Robertson vs. Baldwin, 41 Law Ed. 716;
Novell vs. Heyman, 28 Law Ed. 390;
Slocum vs. Mayberry, 4 Law Ed. 169;
Claflin vs. Houseman, 23 Law Ed. 833.

The rule seems to be well settled that it is beyond the power of Congress to vest judicial power, which under the constitution is exclusively a federal judicial power, in the courts of a state. And the only question here is whether conferring an exclusively federal judicial power upon the judge of

a state court comes within the prohibition. As before stated we can discern no distinction between the *courts of a state,* and the *judges of the courts of a state.* To be sure there is a distinction between a "judge" and a "court," but that distinction does not exist here. The statute attempts to confer this power upon judges of state courts solely in their official capacity as judges of such courts, and not as individuals. When, as individuals, they cease to become judges of such courts they may no longer exercise the power conferred by the statute, and in the last analysis it is apparent that the power is really vested in the court to be exercised, as in the case of tis other powers, by and through its judges.

In conclusion, we again refer to the fact, which the record discloses, that this proceeding was instituted in the Superior Court of the State of Washington, for King County; that the process of the State was attempted to be employed; that jurisdiction over the person of appellant was obtained by means of this process, executed by a peace officer of the State, having no authority to execute process in a federal proceeding. If this be *coram judice* then the term *coram non judice* has neither application nor meaning, and should be relegated to the limbo of forgotten things.

It will not do to say that the record discloses that the appellant is charged with the offense of robbery in the Dominion of Canada, and that the evidence establishes probability of his guilt; that he ought to be extradited, and that these proceedings, notwithstanding their defects, are calculated to effect the desired result, in other words, that the end justifies the means and that "all's well that ends well."

Under the constitution and laws of these United States the appellant cannot be deprived of his liberty and extradited to a foreign country unless by due process of law, and due process of law is conspicuous in this proceeding only by its absence.

We respectfully submit that the order of judgment of the court below should be reversed and that the writ of habeas corpus be granted, and appellant restored to his liberty, that liberty of which he is now deprived, and threatened with extradition to a foreign country, in violation of his legal and constitutional rights.

Respectfully submitted,

JOHN J. SULLIVAN,
JOHN F. DORE and
V. G. FROST,

Attorneys for Appellant.

No. 4634

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

PATTERSON & ROSS,
Attorneys for Appellee.
806 Dexter Horton Building,
Seattle, Washington.

RAINIER PRINTING COMPANY, SEATTLE

No. 4634

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

ARGUMENT.

As we understand the position of the appellant it is that—

1. Revised Statute, Sec. 5270, insofar as that

section undertakes to confer upon judges of State Courts power to entertain complaints in international extradition proceedings, is unconstitutional.

2. That if Congress does have the power to give such authority to state judges, the warrant of arrest in such cases shall be issued by the state judge to run in the name of the President of the United States for the reason that the state judge is acting as a Federal judicial official and that his process so issued is Federal process.

The question raised by the Appellant is an interesting one, but not entirely novel. It is true that extradition from the United States to other countries is controlled exclusively by the Federal Government and the case cited by Appellant (Appellant's Brief, p. 5), *Holms vs. Jennison,* 10 Law Ed. p. 579, so holds. This was a case where the governor of Vermont undertook to issue a warrant directing the sheriff of a county to deliver the prisoner to the Canadian agent to be taken to Canada. The granting of the extradition warrant for the purpose of actually removing the accused to the foreign jurisdiction is exclusively within the jurisdiction of the executive branch of the United States Government. In the case at bar, however, no such question is raised. Here the proceeding before Judge Gilliam

was merely to determine whether there was sufficient evidence to hold the accused pending the action of the Executive Department, not a proceeding for the extradition of the accused.

Appellant argues at great length to the point that the function exercised by the extradition magistrate (in this case Judge Gilliam, a State Judge) is the exercise of judicial power. It is unnecessary for the Appellant to so argue, for undoubtedly, when a state judge acts as a magistrate in an extradition proceeding, he is first called upon to determine whether or not the complaint made under oath before him is sufficient upon which to base his warrant, and later is called upon to hear evidence and decide whether or not such evidence is sufficient to sustain the charge and sufficient to place the accused upon trial had the crime with which he is charged been committed in the jurisdiction of the magistrate. Concededly, in such cases, the magistrate is acting in a judicial capacity and exercising a judicial function, but, and this is the point, he is not exercising a part of the "judicial power" of the United States, as that is used in the Constitution.

"Judicial power" is defined in Sec. 2 of Art. 3 of the Constitution as extending "to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Chisholm vs. Georgia, 1 Law. Ed. 440, p. 464.

The proposition contended for by the Appellant, namely, that Congress has not power to confer judicial powers upon state judges and magistrates, is first found enunciated by Justice Storey in *Martin vs. Hunter,* 4 Law Ed. 97, cited by Appellant, in an observation to the effect that "Congress can vest no portion of the judicial power of the United States except in courts ordained and established by itself." This doctrine was apparently repeated in several subsequent decisions of the United States Supreme Court and was followed by some of the state courts, but all of the decisions, which seem by their language to support the proposition of the Appellant, will be found to be cases where penalties were sought to be enforced.

However, the right of Congress, as a means of accomplishing a thing clearly within the scope of its legitimate powers, to enact laws conferring powers judicial in their nature upon state magistrates, has been recognized by every department of the government practically since the adoption of the Constitution.

It has been held that authority given to justices

of the peace and other state officers to arrest and commit for a violation of the criminal law of the United States, is no part of the "judicial power" within the meaning of that term in the Third Article of the Constitution.

Ex parti Gist, 26 Ala. 156-163;
Prigg vs. Penn., 10 Law Ed. 1060;
Moore vs. Illinois, 14 Law Ed. 306;
In re Kaine, 14 Law Ed. 345;
Robertson vs. Baldwin, 41 Law Ed. 715;
Levin vs. U. S., 128 Fed. 826.

The case of *Robertson vs. Baldwin,* 41 Law Ed. 715, 165 U. S. 275, cited above, clearly points out the distinction between "judicial power" as used in the Constitution and the judicial power and the exercise of judicial function by state magistrates under Federal statutes.

A justice of the peace in Oregon issued a warrant for the arrest of deserting seamen and committed them to jail, under a Federal statute which provided that a justice of the peace might, upon the complaint of the master of the vessel, issue a warrant to apprehend a deserting seaman and bring him before the justice to hear testimony as to whether or not the seaman had deserted, and if the justice so found, to commit the deserter to the county jail of

the said town or place until his vessel be ready to proceed. It was in this case contended that Congress had no authority to vest judicial power in the courts or judicial officers of the several states, and the court held that the power given to justices of the peace to arrest deserting seamen is not within the term "judicial power" as used in the Constitution, and yet, clearly, the justice of the peace under such circumstances was acting in a judicial capacity.

The second point made by the Appellant, namely, that if the state judge has a right to act as an extradition magistrate, he is acting as a Federal judicial officer and should issue Federal process running in the name of the United States and directed to the United States marshal for service, is without merit.

The state judge, acting as extradition magistrate, is not a judge or officer of the United States. He is a judge or officer of the state and is permitted by the state to aid the Federal Government in securing offenders against the laws of other countries so that they may be held for the Executive Department of the United States to carry out the treaty obligations of the Federal Government. This is pointed out clearly in *Ex parte Gist,* 26 Ala. 156-164, cited above.

The purpose in conferring this power upon state magistrates is to make available in extradition cases the entire machinery of both the state and Federal Governments in carrying out our treaty obligations, and Sec. 5270 R. S., provides that whenever complaint under oath shall be made before one of the judges therein mentioned, he shall issue "his warrant."

In the case now before the court, Mitchell Gilliam, a State Judge, was voluntarily assisting the Federal Government and in doing so he issued "his warrant," the only warrant which he has the power, by virtue of his office, to issue, namely, one running in the name of the State of Washington, and properly directed to the Sheriff of the County where the accused might be found.

Respectfully submitted,

PATTERSON & ROSS,

Attorneys for Appellee.

No. 4636

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHUN SHEE,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4636

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHUN SHEE,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

J. H. SAPIRO, Esq., 220 Montgomery St., San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Cal.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Amended petition for writ of habeas corpus.
2. Order to show cause in original petition.
3. Demurrer to amended petition.
4. Minute order regarding immigration record.
5. Judge's opinion in sustaining demurrer and denying petition for writ.
6. Judgment and order sustaining demurrer to amended petition and denying petition for writ.
7. Notice of appeal.

8. Petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Stipulation and order regarding immigration record.
12. Clerk's certificate.
13. Citation on appeal.

J. H. SAPIRO,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Jun. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable, United States District Judge, Now Presiding in the United States District Court, in and for the Northern District of California, Second Division.

Leave of Court having first been obtained, it is respectfully shown by the petition of Yee Ah Shung that Chung Shee, also known as Chan

*Page-number appearing at foot of page of original certified Transcript of Record.

Ah Ho, hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined, and restrained of her liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement and restraint is illegal, and that the illegality thereof consists in this, to wit:

That the said detained arrived in the United States on or about October 18, 1921, at the Port of San Francisco, and was lawfully admitted as the wife of a native, your petitioner, Yee Ah Shung, and ever since said last mentioned date was, and now is, the lawfully wedded wife of your petitioner, and ever since said last mentioned date has been, and now is, living with your petitioner as husband and wife. [2]

That on or about the 3d day of September, 1921, the Secretary of Labor of the United States, acting under and pursuant to Section 19 of the Act of February 5, 1917, did issue his departmental warrant of arrest, charging that said detained has been found practicing prostitution after her entry, and the said detained was thereafter arrested thereunder; and the Secretary of Labor did thereafter make his order of deportation, deporting the said detained from the United States; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China, unless this Court intervenes

to prevent said deportation, the said detained will be deprived of her residence within the United States of America.

That said attempted action of the said Secretary of Labor is illegal and void for the following reasons, and in this behalf your petitioner alleges:

I.

That it is claimed by the said Commissioner that in all of the proceedings had herein, the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Secretary of Labor were taken and made by them within the powers and jurisdiction conferred upon them by law and within the proper exercise of the discretion committed to them by the Statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said Statutes.

II.

But, on the contrary, your petitioner, on his information and belief, alleges that the hearing and proceedings had therein, and the action of the said Commissioner, and the action of the said Secretary in making said order of [3] deportation was and is in excess of the powers and jurisdiction confered upon them, and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and was and is an abuse of the authority committed to them by the said statutes in each of the following particulars thereinafter set forth.

III.

Your petitioner alleges that the warrant issued by the Secretary of Labor was not issued in accordance with law, in that the application for warrant of arrest did not state facts showing *prima facie* that the alien comes *withone* one or more of the classes subject to deportation after entry and was not accompanied by some substantial supporting evidence as provided for in subdivision B of Rule 18, of the Immigration Rules of February 1, 1924, which reads as follows:

> "The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government (except in cases of public charges covered by subdivision C hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector."

but was issued upon a hearsay statement of one Donaldina Cameron, made on August 19, 1924 (the day this detained was arrested), in which she states

that she has known for a year [4] that 34 Beckett Alley was used as a Chinese house of prostitution, "and when we entered the premises this morning, we found Chew Ling (a woman) in bed with Chan Ah Ho (this detained), who is known to the Chinese girls in the Mission as a prostitute."

That said warrant of arrest so illegally issued is indefinite as to time, place and particulars, making it impossible for the detained to ascertain when or where it was claimed she was practicing prostitution or offer more than a general denial of the charge.

IV.

Your petitioner alleges upon his information and belief that the evidence presented before the Immigration authorities upon the hearing granted under the warrant of arrest hereinabove referred to, which said evidence is now hereby referred to with the said force and effect as if set forth in full herein, and which is filed herein as Exhibit "A," was of such a conclusive kind and character establishing the fact that detained has never practiced prostitution in the United States after entry, and failed to substantiate the charge made in the warrant of arrest, and which evidence was of such legal weight and sufficiency that it was an abuse of discretion on the part of said Secretary to make said order of deportation and instead thereof to refuse to be guided by said evidence and the said adverse action of the said Secretary, was, your petitioner alleges, upon his information and belief, arrived at and was done in denying the said detained the fair hearing

and consideration of her case to which she was entitled. That said adverse action of said Commissioner and said Secretary was, your petitioner alleges, upon his information and belief, erroneous in that said Commissioner and said Secretary refused to subpoena certain witnesses on [5] behalf of said detained, although said Commissioner and said Secretary were advised by the attorney for said detained that said witnesses were material and necessary for detained, and would not appear unless commanded so to do, all in violation of Section 16, the Act of February, 1917, subdivision A of Rule 23, and subdivision B of Rule 23, Immigration Rules of February 1, 1924, which read as follows:

> "Section 16. * * * any Commissioner of Immigration, or Inspectors in charge, shall also have power to require, by subpoena, the attendance and testimony of witnesses before said inspectors, and the production of books, papers and documents touching the right of an alien to enter, re-enter, reside in or pass through the United States, and to that end may invoke the aid of any court of the United States; any District Court within the jurisdiction of which investigations are being conducted by an Immigrant Inspector may, in the event of neglect or refusal to respond to a subpoena issued by any Commissioner of Immigration, or Inspector in charge * * * issue an order requiring such person to appear before said Immigrant Inspector * * *

and testify; and any failure to obey such order of Court may be punished by the Court as a contempt thereof.

Rule No. 23—A. * * * But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue.

Rule No. 24—B. Upon determining that a witness whose evidence is desired either by the Government or the [6] alien will not be likely to appear and testify, or produce written evidence unless commanded to do so, the Commissioner or inspector in charge shall issue a subpoena and have it served upon the witness by an immigration officer or employee, in conformity with this rule, due record of such service to be made. If the witness neglects or refuses to respond to the subpoena, the United States Attorney of the proper district shall be requested so to report to the appropriate district court, with a motion that an order be issued requiring the witness to appear or to produce written evidence, as contemplated by section 16 of said act or for action as herein specified in event of continued neglect or refusal."

and that such witness, as the said detained demanded, been subpoenad and commanded to appear before said Commissioner at said hearing, your

petitioner states upon information and belief that said witnesses would have testified substantially for and on behalf of said detained, and that the testimony in the record would have been such as to require a different order by the Secretary of Labor, and sufficient to prevent the issuing of the order of deportation.

That said Secretary disregarded all of the testimony which was favorable to the detained, and that such action by said officials rendered said hearing before the Department of Labor unfair and in violation of detained's rights to a full and impartial hearing upon charge contained in the warrant of arrest.

And your petitioner further states that the witnesses which were required to be subpoenad by the detained were examined by the Inspectors of the Immigration Department, and that the petitioner did not have an opportunity to cross-examine such witnesses, and the said decision of said [7] Secretary was arrived at by taking into consideration matters extraneous to the record, and not appearing therein by evidence adduced in the presence of said detained.

V.

That said adverse action of said Commissioner and said Secretary was, your petitioner alleges, upon his information and belief, erroneous, in that in finding the charge in the warrant as sustained and in making the order deporting detained, and in threatening to deport her, are acting in excess of their jurisdiction and power, in that it is depriving

and denying a citizen of the United States the right to have his wife reside with him in the country of his nativity, as well as to enjoy the society and assistance of said wife, the detained. That said action was done in excess of the powers and jurisdiction conferred on said Secretary and said Commissioner and in excess of the discretion committed to said Secretary and said Commissioner of Immigration. And your petitioner further alleges upon his information and belief, that the said action of the said Secretary and of the said Commissioner was influenced against the said detained and against her witnesses solely because of their being of the Chinese race.

That the said detained is in detention as aforesaid and for said reason is unable to verify this said petition upon her own behalf and for said reason this petition is verified by Yee Ah Shung, your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court, at a time and place to be specified in said order, [8] together with the time and cause of her detention, so that the same may be inquired into the end that said detained may be restored to her liberty and go hence without day.

Dated: ————.

J. H. SAPIRO,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Yee Ah Shung, being duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition*er;* that the said has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief and as to those matters he believes it to be true.

YEE AH SHUNG.

Subscribed and sworn to before me this 23 day of May, 1925.

[Seal] JOSEPH PENSA,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 13, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Yee Ah Shung praying for the issuance of a writ of habeas corpus, it is hereby ordered that John D. Nagle, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 18th day of April, 1925, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not issue in this matter as herein prayed.

IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever acting under the orders of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Chun Shee, also known as Chan Ah Ho, within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until it is further ordered herein.

IT IS FURTHER ORDERED that a copy of this order be served upon said John D. Nagle, or such other person having the said Chun Shee, also known as Chan Ah Ho, in custody as an officer agent of the said John D. Nagle.

IT IS FURTHER ORDERED that during the pendency of these proceedings and the order to show cause that the said detained may be released from custody upon her furnishing a good and sufficient bond with surety or sureties to be [10] approved in accordance with the statutes in said cases

made and provided and the rules of this court, in the sum of Three thousand ($3,000.00) Dollars.

Dated San Francisco, California, this 30th day of March, 1925.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Mar. 30, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, on Habeas Corpus.

DEMURRER TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration, at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the amended petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said amended petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said amended petition is insufficient in that

the statements therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

STERLING CARR,
United States Attorney.
ROBERT M. FORD,
Assistant United States Attorney,
Attorneys for Respondent. [12]

[Endorsed]: Filed June 13, 1925. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy. [13]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 16th day of June, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge.

No. 18,615.

In the Matter of CHUN SHEE, etc., on Habeas Corpus.

MINUTES OF COURT—JUNE 16, 1925—ORDER SUSTAINING DEMURRER, Etc.

The demurrer to petition and the demurrer to the amended petition heretofore heard and submitted,

being now fully considered, it is ordered that said demurrers be and the same are hereby sustained, that the application for a writ of habeas corpus be, and the same is hereby, denied, and that the petition herein be and the same is hereby, dismissed. [14]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court and to the Hon. STERLING CARR, United States Attorney for the Northern District of California.

You and each of you will please take notice that Yee Ah Shung, your petitioner, and Chun Shee, the detained above named, do hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and entered herein on the 16th day of June, 1925, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 18, 1925.

J. H. SAPIRO,

Attorney for Petitioner and Appellant Herein.

[15]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

PETITION FOR APPEAL.

Now comes Yee Ah Shung and Chun Shee, the petitioner and the detained, and the appellants herein, and say:

That on the said 16th day of June, 1925, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, those appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof.

Dated at San Francisco, California, June 18, 1925.

J. H. SAPIRO,

Attorney for Petitioner and Appellants Herein.

[16]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

ASSIGNMENT OF ERRORS.

Comes now Yee Ah Shung, the petitioner, and Chun Shee, the detained, by their attorney, J. H. Sapiro, Esq., in connection with his petition for an appeal herein, assign the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First: That the Court erred in sustaining the demurrer to, and in denying the petition for a writ of habeas corpus herein.

Second: That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third: That the Court erred in sustaining the demurrer and in denying the petition of habeas corpus herein and remanding the petitioner to the

custody of the immigration authorities for deportation.

Fourth: That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioners from custody as prayed for in said petition. [17]

Fifth: That the judgment made and entered herein is not supported by the evidence.

Sixth: That the judgment made and entered herein is contrary to law.

Seventh: That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, Second Division, made and entered herein in the office of the Clerk of the said court on the 16th day of June, 1925, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to discharge the said Chun Shee from custody, or grant her a new trial before the lower court, by directing the issuance of a writ of habeas corpus as prayed for in said petition.

Dated at San Francisco, California, June 18th, 1925.

J. H. SAPIRO,

Attorney for Petitioner and Appellants Herein.

[18]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

ORDER ALLOWING PETITION FOR APPEAL.

On this, the 18th day of June, 1925, comes Yee Ah Shung, petitioner, and Chun Shee, the detained, by their Attorney J. H. Sapiro, Esq., and having previously filed herein, did present to this Court, their petitions praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by them and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and

orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that pending the hearing of said case in the United States Circuit Court of Appeals for the Ninth Circuit, that the detained, Chun Shee, may be released from custody upon her furnishing a good and sufficient bond with surety or sureties to be approved in accordance with the statutes in said cases made and provided, and the rules of this court, in the sum of Three [19] Thousand ($3,000.00) Dollars, and the surety bond she has now given, and upon which she has obtained her liberty, may stand as the bond pending said appeal.

Dated at San Francisco, California, June 18, 1925.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Service and receipt of copy of the within notice of appeal, etc., is hereby admitted this 20th day of June, 1925.

STERLING CARR,
(F.)
U. S. Atty.

Filed Jun. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [20]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

STIPULATION AND ORDER RESPECTING WITHDRAWAL OF IMMIGRATION RECORDS.

It is hereby stipulated and agreed by and between the attorney for the petitioners and appellants herein and the attorney for the respondent and appellee herein that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the Clerk of the above-entitled court and filed with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as a part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record, and so certified to by the Clerk of the court.

Dated: San Francisco, California, June 18, 1925.

STERLING CARR,
Attorney for Respondent and Appellee.

J. H. SAPIRO,
Attorney for Petitioner and Appellants. [21]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,615.

In the Matter of CHUN SHEE, also Known as CHAN AH HO, on Habeas Corpus.

ORDER RE WITHDRAWAL OF IMMIGRATION RECORDS.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the Clerk of this court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court.

Dated: San Francisco, California, June 22d, 1925.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jun. 22, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [22]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of Cal-

ifornia, do hereby certify that the foregoing 22 pages, numbered from 1 to 22, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of Chun Shee, etc., on Habeas Corpus, No. 18,615, as the same now remains on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on appeal.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of eight dollars and eighty cents ($8.80), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of July, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [23]

CITATION ON APPEAL.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Commissioner of Immigration of the Port of San Francisco, Hon. JOHN D. NAGLE, and to the United States District Attorney for the Northern District of California, Hon. STERLING CARR, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Chun Shee is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 23d day of June, A. D. 1925.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of copy admitted June 24, 1925.

STERLING CARR,
(G.)
U. S. Atty.

[Endorsed]: No. 18,615. United States District Court for the Northern District of California, Second Division. Chun Shee, Appellant, vs. John D. Nagle. Citation on Appeal. Filed Jun. 24, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

[Endorsed]: No. 4636. United States Circuit Court of Appeals for the Ninth Circuit. Chun Shee, Appellant, vs. John D. Nagle, Commissioner of Immigration of the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed July 14, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

9

No. 4636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

J. H. SAPIRO,
Mills Building, San Francisco,
Attorney for Appellant.

Subject Index

Table of Authorities Cited

No. 4636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

This is an appeal from an order dismissing on demurrer a petition of appellant for discharge on habeas corpus. Appellant is an alien and native of China, and has resided in this country about four years, having been admitted August 18, 1921, as the wife of Yee Ah Shung, native born citizen of the United States. On August 19, 1924, she was arrested under the authority of Section 19, the Act of February 5, 1917. (39 Stats. 889.) This statute provides for the deportation of "any alien who shall be found an inmate of * * * a house of prostitution or practicing prostitution after such alien shall have entered the United States."

A preliminary hearing was had in this case on August 20, 1924, and was then continued until August 29, 1924, and a deportation warrant was issued on September 3, 1924. Under that warrant a hearing was had on November 21, 1924, at which the alien was represented by counsel. Further hearing was had on December 30, 1924. At the conclusion of the hearing the record was transmitted to the Secretary of Labor, and thereafter an order was issued for appellant's deportation to China. The appellant maintains that there are three grounds upon which this writ should have been granted;

First: That she was denied a fair hearing in that

(a) The Commissioner of Immigration refused to subpoena certain witnesses after request therefor was made by the petitioner in accordance with the rules and regulations of the department.

(b) That the Commissioner, in arriving at his decision, took into consideration the investigation of Inspector Benson, who interrogated the witnesses desired to be subpoenaed by appellant, and took into consideration the said inspector's version of what these witnesses would testify, without giving to the petitioner an opportunity to cross-examine those witnesses.

Second: That the order of deportation is not based upon evidence sufficient to warrant such an order being made.

Third: That the issuance of the order for arrest is unsupported by the proper showing as required by Section 18 of the Immigration rules.

THE FACTS.

The sole charge against this applicant is "that she has been found practicing prostitution after her entry." The charge against her, as set forth in the warrant of arrest, is indefinite as to time, place and particulars, and the testimony offered by the Government in support of the charge is not much more specific, making it most difficult for the defendant to offer more than a general denial of the charge.

It appears that Miss Donaldina Cameron, in charge of a rescue mission, was searching for a young Chinese woman (other than the petitioner), whom she located at 34 Beckett Alley, and made a raid on those premises. All the persons found therein, including this defendant, who was arrested as a prostitute, were tried in the Police Court and acquitted. It is not claimed by the Government that the petitioner was an occupant of a house of prostitution or was engaged as such at the time of the alleged raid; she and another Chinese woman occupying the two rooms which were rented by the husband of the detained, and for which he paid the rent.

The Government produced, at the various hearings, six witnesses. Two police officers (government witnesses) testified that the petitioner was not a prostitute and had never attended tong banquets and flatly contradicted the other four witnesses proffered by the Government. These four witnesses were Chinese women who had, at some time or other, been prostitutes in the City of San Francisco,

and who were inmates of a rescue mission and who are evidently being kept in this country for the purpose of acting as professional witnesses in this class of cases. Their testimony in general was, that at some time at least one year previous to the date of the arrest they knew the petitioner and knew her to be a woman who frequented tong banquets and had at some time accompanied men to various hotels in the City of San Francisco. Their testimony was so general, without any specific dates, places, names of hotels, that the petitioner was unable to meet these generalities except by a general denial. In only one particular instance were these four witnesses definite as to a specific address and place, and that was that the applicant lived at 719 Sacramento Street, San Francisco, at the time when they knew her, and that at that time they claimed she was practicing prostitution in those premises. It will thus be seen that the facts and circumstances regarding the petitioner's alleged residence at 719 Sacramento Street, and whether or not she practiced prostitution there, is of the most vital and utmost importance, and it is in regard to this particular bit of testimony that the refusal of the Immigration Authorities to issue a subpoena for the owners and managers of 719 Sacramento Street, San Francisco, rendered the entire hearing unfair. That act of the Immigration Authorities was so prejudicial to this petitioner as to make the whole proceeding a farce instead of an orderly and fairly conducted hearing such as is contemplated by the

laws of the United States, the decisions of the Supreme Court and the rules and regulations of the department.

A more detailed discussion of the evidence will be discussed under point II in this brief wherein it is the petitioner's contention that in no event is there any evidence sufficient to warrant the making of an order of deportation.

I.

(a) THE HEARING WAS UNFAIR FOR THE REASON THAT THE COMMISSIONER OF IMMIGRATION REFUSED TO SUBPOENA CERTAIN WITNESSES AFTER REQUEST THEREFOR WAS MADE BY PETITIONER.

It will be specifically noted that the Government did not claim that this woman was an inmate of a house of prostitution, or that there were any circumstances surrounding her arrest upon which such a fact could be found, but relied exclusively upon the testimony of four self-confessed prostitutes who vaguely testified that at a time approximately one year prior to the date of the arrest that they knew this petitioner, and that at the time she was known to them she was practicing prostitution at 719 Sacramento Street, in the City of San Francisco. All of the rest of the testimony was so vague that it could not be controverted at any point, except as to this particular bit of testimony.

The Government, having rested its case upon the conduct of the petitioner at a date one year previous

to the arrest, at which time it was claimed she was practicing prostitution at 719 Sacramento Street, San Francisco, California, it became of the most vital importance that this testimony be controverted by the petitioner by evidence of the people owning or operating 719 Sacramento Street, San Francisco, California. As will be noted from the statement of counsel in the record hereinafter quoted in full, he made an investigation himself of the premises and talked to the partners there and requested them to become witnesses in the case and testify as to their knowledge of the petitioner. They refused to testify, and the foundation was then laid for the issuance of a subpoena, and a request was made therefor in the following language.

At the conclusion of the hearing of December 9, 1924, the following request was made by counsel for the alien:

> "I would like to make a statement for the record, *to lay the foundation to have a subpoena issued on behalf of the defense in this case.* After the conclusion of the last hearing I suggested to the husband of this defendant * * * to endeavor to have the owners or lessees of the place appear at this office and testify as to what they knew, if anything, about this case,—of her living at those premises or of any other person of lewd character ever having lived there. He reported to me he went to 719 Sacramento Street and interviewed the partners of the Wing Tai Yuen Company, but they refused to interest themselves in the case, in any manner, whatsoever, owing to the fact that he is not a clansman and that they had no interest in his wife and did not care to mix

up in a Chinese case. I * * * went to the firm of Wing Tai Yuen, at 719 Sacramento street, and walked in, and I found when I reached the store that I knew the firm very well, and knew the manager, a man named Lee Yik. * * * I presented the case to Lee Yik, whom I have known for twenty years, and who bears a good reputation as a merchant and a Chinese interpreter. I explained this case to him in full. He told me that he never met this defendant. Chan Ah Ho, that she never lived in the store premises or in the rear of the store premises, or anywhere at that store of Wing Tai Yuen Company, 719 Sacramento street, that he never heard of a woman named Choy Yung Goo, or a woman by the name of Goo Goo Yun, that these women never lived, at any time, in those store premises, nor did they solicit prostitution there or were, so far as he knows, or other partners in the store know, that they were procuresses, that they never lived or procured or solicited, from that store or in that store premises, women or men for the purposes of prostitution. I insisted that he should come here as a witness and he absolutely refused to do so. He said, 'You would not expect me to mix up in some other family case where the question of prostitution is raised, or would you expect me to appear and testify as to the conditions of my store, now or at any other time, for people who are not my clansmen.' He also stated that one reason he would not appear was that he would pay no attention to any testimony—or would it interest him—the testimony of prostitutes from the Mission. *The testimony is very vital to this case, positively, definitely.*"

Both the Immigration laws and rules of the Department of Labor provide for the issuance of a

subpoena under circumstances such as the request for the subpoena disclosed.

Section 16 of the Act of February 5, 1917, provides as follows:

> "Section 16. * * * any commissioner of Immigration, or inspector in charge, shall also have power to require, by subpoena, the attendance and testimony of witnesses before said inspectors."

The rules and regulations of the Secretary of Labor under date of February 1, 1924, provide as follows:

> "Rule 23. SUBPOENAING WITNESSES. Subdivision A.—WHEN POWER EXERCISED.
>
> Paragraph 1. * * * If an alien requests that a witness be subpoenaed, he shall be required to show affirmatively that the proposed evidence is relevant in material and that he has made diligent efforts, without success, to produce the same. * * * But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

Immediately upon the conclusion of the hearing the inspector in charge went to 719 Sacramento Street and took the statement of a man who pretended to be the manager of the premises, and the following question was asked of that person:

> "Q. I wish to advise you that Attorneys Stidger and Sapiro who are representing the Chinese woman, Chan Ah Ho, have stated that

Lee Yick was the manager of this store and have requested that I call here to interview Lee Yick and to examine the premises.

A. I have just telephoned to Lee Yick and he refuses to come. He does not want to talk to you.

Q. Will you again call Lee Yick and tell him an officer from the Immigration Service is here at the request of Attorney Stidger and would like to talk to him? (Note. Witness goes to telephone and talks in Chinese.)

A. I have called him again on the telephone and he refuses to come.

Q. Do you know a man by the name of Lee Lun?

A. Yes, he is a partner."

Inspector Benson, in his report to the Commissioner of Immigration on December 12, 1924, wrote the following:

"Mr. Stidger requested that an investigation of this store be conducted by an officer of this service, and, if possible, the manager Lee Yick, be subpoenaed in order to have him testify regarding the character of the store. * * * A statement was taken from Lee Chin which is transmitted herewith. It will be noted in the statement of this Chinese, Lee Lim, that he got in communication by telephone with Lee Yick, to come to the store at 719 Sacramento Street, but Lee Yick refused to be interviewed. He (Lee Lim) stated that he did know Lee Yick but that Lee Yick was not connected with the firm in any manner. * * * At the time I called the store appeared to be a legitimate place of business. * * * I believe a date for further hearing in this case should be set in order that the statements of Police Officers, Manion and Floyd might be introduced and

made a part of the record as well as the statement of Lee Lim and partnership list of the firm of Wing Tai Yuen. If the attorneys of record so desire Police Officers Manion and Floyd will be produced for cross-examination."

On December 12, 1924, a letter was written by the Commissioner of Immigration to the attorneys in this case, a part of which reads as follows:

> "At the conclusion of hearing in the case of your client, Chun Shee, held December 9, 1924, you made a statement in which you requested that the store of Wing Tai Yuen, 719 Sacramento Street, be investigated with the view of having the Manager, Lee Yick subpoenaed to testify regarding the character of the store.
>
> Inspector Benson on the same day conducted an investigation of this store and from his report it appears that Lee Yick is not connected with the firm of Wing Tai Yuen Company. Inspector Benson secured statements of Police Officers Manion and Floyd and also a statement of Lee Lim who claims to be Manager of the Wing Tai Yuen Company; these statements are enclosed herewith.
>
> Further hearing in this case will be held at this office, 68 Appraisers Building, December 18, 1924, at 2:00 P. M. in order that the testimony of Sergeant Manion, Officer Jack Floyd and the Chinese, Lee Lim, might be introduced and made a part of the record. Should you desire to *cross-examine any of these witnesses kindly advise* and they *will be produced at this office on the above date for cross-examination.*"

Thereafter Sergeant Manion and Officer Floyd were produced for cross-examination, and it will

be noted that they absolutely repudiated the affidavits secured from them, and failed and were unable to identify the petitioner, Chun Shee, as a prostitute, and further stated that although they had attended all of the Tong banquets in San Francisco that the petitioner was never present at any of them. The Government failed to *produce the witness Lee Lim for cross-examination and relied upon his statement that Lee Lim was not the manager* of the store, and failed to subpoena either Lee Yick or Lee Lim and give the petitioner an opportunity of cross-examination or the benefit of their testimony at this hearing.

That part of Section 16 of the Act of February 5, 1917, giving the right of the Commissioner of Immigration to subpoena witnesses, and Rule 23 of the Immigration rules above quoted, was not put into the law for any idle purpose.

Originally Section 16 (34 Stats. at Large 903) did not have a provision in it giving the Commissioner the right to subpoena witnesses. In 1911 the Supreme Court of the United States considered this fact in the case of *Low Wah Suey v. Backus,* 225 U. S. 470, 58 L. Ed. 1168, where it said: "The statute does not give authority to issue process and compel the attendance of witnesses." The contention had been advanced in that case that the failure of the Commissioner to subpoena material witnesses on behalf of the detained rendered the hearing unfair. But the Supreme Court said, and rightfully,

that there being no provision in the statute to compel the attendance of witnesses, and that Congress, having the right to lay down the procedure governing the hearing, had failed to give the alien that privilege; that the failure to subpoena witnesses was through no fault or neglect of the Commissioner, and that the alien could not complain.

In 1917 the Statute was amended so as to give the Commissioner that power. (Act of February 5, 1917, ch. 29, §16, U. S. Comp. St. 4289¼i), and thereafter Rule 23, which is hereinbefore quoted, was promulgated by the Secretary under the authority vested in him under Section 23 of the General Immigration Laws, which provide: "He shall establish such rules and regulations so as to make effective all laws relating to the immigration of aliens into the United States." And it is, of course, conceded that these rules and regulations have the force and effect of law when not inconsistent with the provisions of the act itself, or of the Constitution of the United States, or the treaties of this country with foreign powers, and are binding on the courts.

Ex parte Chow Chok, 161 Fed. 627;
Fok Young Yo v. United States, 185 U. S. 296, 46 L. Ed. 917.

In the case of *Johnson v. Tertzag,* 2 Fed. (2d) 40, the Circuit Court of Appeals said:

> "It is as much the duty of the immigration officials to admit aliens exempted from the

> general policy of exclusion as it is to exclude those falling within the excluded classes. Administrative officials may not *ignore essential parts of the statutes they are administering.*"

In the case of *Ex parte Tozier,* 2 Fed. (2) 268, the Court said:

> "It cannot be too often repeated that administrative tribunals which exercise such tremendous powers over the liberty or persons without the safeguards which experience had shown necessary in court proceedings, and which are at once policeman, prosecutor, judge and jury, are bound to a scrupulous regard for the rights of persons affected by their action."

As to what constitutes an unfair hearing the Supreme Court of the United States, and the various Circuit Courts of Appeal have repeatedly passed upon that question, and in *Kwock Jan Fat v. White,* 253 U. S. 454, 64 L. Ed. 1010, that Court summed up the law concisely as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation,' or show 'manifest abuse' of the discretion committed to the executive officers by the statute (Low Wah Suey v. Backus, supra), or that 'their authority was not fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.' Tang Tun v. Edsell, 223 U. S. 673, 681, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359. The decision must be after a hearing in good faith,

however summary (Chin Yow v. United States, 208 U. S. 8, 12, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201), and it must find adequate support in the evidence (Zakonaite v. Wolf, 226 U. S. 272, 274, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31)."

In *Whitfield v. Hanges,* 222 Fed. 745, at 749, the Court said:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support. In re Rosser, 101 Fed. 562, 567; In re Wood & Henderson, 210 U. S. 246, 254, 52 L. Ed. 1046; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 57 L. Ed. 431; Ex parte Petkos (D. C.) 212 Fed. 275-278; United States v. Sibray (C. C.) 178 Fed. 144, 149. That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the accused from procuring the witnesses or evidence or counsel he desires. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed.

598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523."

And at page 753:

"And that is not a fair hearing in which the inspector with his control of important witnesses takes their statements in a secret ex parte examination before himself prior to the hearing, and then refuses the request of the accused to call them, or to request them to testify at the hearing, and thereby deprives the accused of the opportunity to examine or cross-examine them and to have the benefit of their testimony. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed. 598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523."

The last case of the United States Supreme Court on this subject is *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 148, 155, 68 L. Ed. 221, 224, where the Court said:

"It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law."

and in this case we insist upon the observance of rules promulgated by the Secretary pursuant to law. We insist upon the right to have a subpoena issued to bring in the owners and manager of 719 Sacramento Street and let them testify to whether or not this appellant ever, or at all, either lived at or practiced prostitution in the premises known as

719 Sacramento Street, and thus to controvert the testimony adduced by the Government and upon which it rests the case. To deny this right to the appellant is to strip her of every constitutional guarantee and every opportunity for defense that the law has afforded her in cases of this kind. And one might just as well strike from the statute books every rule for the protection of an alien in a hearing and overrule every decision of the Supreme Court and the Circuit Courts of Appeal, giving to an alien the right of a fair hearing if this arbitrary authority arrogated to itself by the Department of Labor should be sustained.

It certainly should not take much argument to convince this Court that where a congressional enactment has been placed upon the statute books which provides for the subpoenaing of witnesses to enable the detained to make her defense, and that thereafter the Secretary of Labor has promulgated a rule to carry this into effect, that an examining inspector cannot disregard that rule, brush it aside and refuse to subpoena the witnesses requested by her. This is not a case where the department is unable to locate the witnesses, but is one where the department simply has refused to do so on some theory best known to them, and have prejudged her case. Certainly orderly procedure, and the fundamental requirements of a fair hearing does require that in the instant case the witnesses should have been subpoenaed and the testimony taken in the presence of the detained.

How can the department justify its action in refusing to subpoena the witnesses after a demand therefor? In this case they say—"We went out and talked to the witnesses—what you claim they will testify to—they deny. Therefore we will incorporate their denial into the record and you will not be given an opportunity either to examine or cross-examine them." And that was precisely done in this case. Is that the fair hearing contemplated by the Supreme Court and the laws? To merely state the proposition is to answer it.

And it cannot be claimed that the evidence sought from the witness for whom the subpoena was demanded was of little importance. *It was most vital.* For if it could be shown that appellant had never lived or practiced prostitution at 719 Sacramento Street, which is a store, then the Government's case would have been completely shattered, as their witnesses would have been shown to be testifying falsely on the only fact on which they testified definitely.

(b) THE HEARING WAS UNFAIR IN THAT APPELLANT WAS NOT GIVEN AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESS LEE LIN.

The manager of No. 719 Sacramento Street was examined by the inspector and no opportunity to cross-examine him was afforded to petitioner or her attorneys, and that this examination was relied upon in part by the department in making its order

of deportation. Subdivision "a", Rule No. 23, set out on page 5 of the petition, reads as follows:

> "Rule 23. * * * But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

The hearing was conducted in violation of this rule, and renders the hearing unfair. In the very recent case of *Ungar v. Seaman,* Immigration Inspector, 4 Fed. Rep. 2d Series (advance sheets, May 7, 1925), the Circuit Court of Appeals for the Eighth Circuit held:

> "In proceedings for deportation of an alien who has been a lawful resident of the United States, he is entitled to a hearing and decision of the charges against him according to the fundamental principles that inhere in due process of law, and indispensable requisites of such hearing are that the course of proceeding shall be appropriate to the case and just to him, that he shall be notified of the charge against him in time to meet it, shall have an opportunity to be heard and to cross-examine the witnesses against him, and shall have time and opportunity, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute it, and that the decision shall be governed by and based upon the evidence at the hearing."

As we have stated before the General Immigration Act of 1907 did not give to a defendant the right of cross-examination of any witnesses who

had submitted evidence upon behalf of the Government. That such was permitted has been repeatedly upheld by the Supreme Court of the United States and the various Circuit Courts of Appeal. Notwithstanding this, the proposition was so revolting to the public conscience that when Congress enacted the Immigration Law of 1917 they placed a material amendment in the new law which gave the defendant the right to cross-examine witnesses whose evidence was submitted by the Government against him, and it also gave the defendant the right to compel the attendance of witnesses by subpoena. In examining cases submitted pro and con upon this point it is essential to observe which of the immigration acts was involved and considered because the Immigration Act of 1907 does not give the rights which are asserted in this present case and which are accorded in the Immigration Act of 1917.

In *Ex parte Jackson* (263 Fed. 110), Judge Bourquin held as follows:

> " * * * Insofar as petitioner asserts unfairness, in that his objections are excluded from the record, the rules permit objections to be made in briefs. Whether fair or not in ordinary cases, in a case wherein the alien's rights have been infringed to the extent here, the court will take note of it, whether or not objections have been made with technical precision, and hold the proceedings unfair. So were the proceedings for failure to produce Ambord for cross-examination. The rules require his production. The condition the inspector imposed is unwarranted. It is author-

> ized only in respect to petitioner's witnesses, and not in respect to government's witnesses and their cross-examination. Ambord was a vital witness. He identified pamphlets as those seized, an essential link in the chain of circumstances. Although there was another witness to the same matter, none the less was the alien entitled to the benefit of the rule, and to cross-examine Ambord; and failure to produce Ambord denied the alien the due process of the rule, and is fatal to fairness of the proceedings. It cannot be said that in any event the decision would have been the same, unless it also be said that in any event the alien was to be deported."

The Government perfected an appeal from this decision to this Court, but recourse to the records shows that the same was thereafter dismissed. (267 Fed. 1022.)

Another decision of Judge Bourquin to the same effect is *Ex parte Radivoeff* (278 Fed. 227), in which it was held:

> "In addition to the unsupported warrant, the alien a witness against himself, quasi secret rather than open and public hearings, which it is not determined of themselves alone would be fatal to fairness, there is flagrant disregard of the department's rules and of the general law of evidence and procedure. The object of Rule 22, to enable the alien to prepare for hearing and therein to have counsel, not partially, but throughout, was defeated, probably in conformity to the secret circular of the time, and set out in the Colyer Case (D. C.) 265 Fed. 46.
>
> "So, too, the great test of truth, cross-examination of adversary witnesses provided by Rule 24, was denied the alien. The conditions prece-

dent imposed by Andrews, by the rule, relate to the alien's witnesses, and not to the government's witnesses. To disclose what the alien expects to prove by cross-examination is subversive of the object of cross-examination, is violative of settled procedure, and is contrary to said rule. In re Jackson (D. C.) 263 Fed. 110.

"In deportation hearings, if the department resorts to statements, whether or not verified, by inspectors and others, failing to produce the makers of the statements for the alien's cross-examination, it cannot escape the consequences of ex parte and incompetent evidence by any plea of distance and expense. Without cross-examination, too often the alien is helpless. U. S. v. Uhl (C. C. A.) 266 Fed. 38, is illustrative. Therein the alien was deported upon a charge like that of the instant case, and the only evidence thereto was an affidavit that the alien had been heard to say that if 'the strike is not settled' he would 'blow up the shops'. The alien, examined on oath at the hearing, denied he had said it. The maker of the affidavit, whom the inspector later said was 'a private detective hired by the city' of the strike, was not produced nor requested to be produced for cross-examination—'out of town', and the affidavit prevailed over the alien's denial.

"As a corollary to the rule aforesaid, the law also is that if the proceedings are without the support of substantial and competent evidence or otherwise unfair, the department's adverse decision is subject to review in the courts, and to be defeated by habeas corpus in release of the alien. This is the case. Writ granted."

The cases of *Kwock Jan Fat v. White,* supra, *Whitfield v. Hanyes,* supra, *United States ex rel.*

Bilokumsky v. Tod, supra, heretofore cited under subdivision A of point 1, have also very pertinent language relating to the right of cross-examination of witnesses produced by the Government.

The department, recognizing the right of cross-examination, wrote a letter to the attorneys for the appellant under date of December 12, 1924, which is quoted at length on page 10 of this brief, after they had taken the ex parte affidavits of Officers Floyd and Manion and Lee Lim, the alleged manager of 719 Sacramento Street, and said as follows: "Should you desire to cross-examine any of these witnesses kindly advise. They will be produced at this office on the above date for cross-examination." On December 18, 1924, after request was made for the cross-examination of these witnesses, the Government produced Officers Floyd and Manion, who on cross-examination absolutely repudiated their alleged ex parte affidavits and failed to identify the appellant. Why and for what reason Lee Lim was not produced for cross-examination does not appear in the record, and this failure is of such material error that in and by itself would be sufficient ground for the granting of the petition.

II.

The order of deportation is not based upon evidence sufficient to warrant such an order being made. Appellant recognizes the rule so many times

announced and adhered to by this Court: that it is not the Court's function to weigh the evidence in this class of cases. But as this Court has announced in *Ong Chow Lung v. Burnett,* 232 Fed. 853 (C. C. A.), and reiterated in *Chan Kam v. U. S.,* 232 Fed. 855 (to which we will refer at length later in this brief), the true rule is:

> "It is not our function to weigh the evidence in this class of cases, but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751 (138 C. C. A. 199); McDonald v. Siu Tak Sam, 225 Fed. 710 (140 C. C. A. 584); Ex parte Lam Pui (D. C.) 217 Fed. 456."

Appellant's contention in brief is that the Government's case rests entirely on suspicion and conjecture and not upon evidence. The only testimony in the case is that of four misguided girls who evidently remain in the country and are not deported as long as they act as professional witnesses, and which does not rise to the dignity of evidence when considered as a whole. A mass of generalities—nothing more, and only definite on one point, and as to that the appellant was denied the right of subpoenaing witnesses so as to refute it.

It appears that Donaldina Cameron, in charge of a rescue mission, was searching for a young Chinese woman by the name of Chew Ling, whom she located at 34 Beckett Alley, San Francisco, and on August 19, 1924, in connection with San Francisco police officers, made a raid on said premises, and apparently arrested all of the persons found therein, including this defendant, who was arrested as a prostitute, tried in *Police Court and acquitted.* Apparently the evidence presented against her in Police Court was substantially the same as that presented in this record.

The charge that the premises at 34 Beckett Alley was a house of prostitution was disproved in Police Court, as the keeper of the premises, who was arrested at the same time as this defendant, was tried and acquitted. It further appears that the Chinatown detective squad of the San Francisco police department, whose business it is to ferret out such places, had no information that said premises were being used as a house of prostitution.

The only evidence offered which might be considered as giving support to the charge is the testimony of four self-confessed ex-prostitutes. They are not credible witnesses. They are self-confessed law breakers and moral degenerates. In a recent case (*In re Verbich,* 1 Fed. (2d) 589) a United States Court refused to grant naturalization to an alien because one of his witnesses had been a "bootlegger", and the Court held that he was not a cred-

ible witness. The said four witnesses in the pending case are under the control and jurisdiction of said Miss Cameron, who made the misleading statement, above mentioned, upon which the warrant of arrest in this case was predicated. They are dependent upon her for their food and shelter, and doubtless are relying upon influence to prevent their deportation to China. It could hardly be claimed that they are free moral agents. Any one who has read testimony given by Miss Cameron in such cases will recognize that these witnesses have little or no regard for the truth; they have no sense of honor or justice and are not concerned about the injury they may inflict upon an innocent person—with them it is more a question of food, shelter and protection for themselves. Three out of the four said witnesses, Rose Wong, Lilly Chan and Lily Lum are apparently professional witnesses for the mission and their names have become quite familiar in cases originating through Miss Cameron.

Miss Donaldina Cameron does not claim any personal knowledge regarding the character of this defendant.

Police Sergeant Manion, in charge of the Chinatown squad, gives no testimony which would indicate even a suspicion that this defendant ever practiced prostitution.

Police Officer John F. Floyd identified the photograph of this defendant as a woman whom he had seen at many tong banquets, but when he was con-

fronted with the defendant in person, admitted that he had made a mistake and she was not the woman he had in mind. There is nothing whatever in his testimony reflecting upon the character of the defendant. We will now make a brief reference to the testimony of the four self-confessed ex-prostitutes:

Rose Wong says she first met this appellant in a store, 719 Sacramento Street, in the latter part of 1921; that she saw her in numerous tong rooms and tong headquarters so many times that she cannot count them all; that she has never seen her practice prostitution but "assumes that she is a prostitute" because she attended carousals, etc.; she does not know of any men who slept with this defendant for money. * * * Even if she were a credible witness, her testimony would be worthless to substantiate the charge against this defendant. She merely assumes that the defendant was a prostitute. With the exception of the store above mentioned, this witness does not mention a single street and number, or the name of a place, or a single specific date when and where she saw this defendant. She does not mention a single specific act of prostitution on the part of this defendant.

Lily Lum claims to have first met the defendant at 719 Sacramento Street at the Wing Tai Yuen store and that she knew her from January, 1922 to January, 1923. She claims that the defendant lived at this store a year and a half or two years and a half. She does not claim to have any actual knowl-

edge that this defendant practiced prostitution; nor does she relate any other incriminating actual facts. The full extent of her knowledge, according to her claim, is that the defendant went to certain hotels with men, but merely going to a hotel with a man does not warrant the conclusion that prostitution was indulged in. Suspicion is not proof, and her testimony is utterly lacking in essential incriminating facts.

Lung Ah Sun testified that she first became acquainted with this defendant about May or June, 1923, at the Hang Far Low restaurant, where they dined at the same table. She makes the broad statement that this defendant "has been to almost every hotel in Chinatown to practice prostitution that I know of", but she does not mention a single specific time and place, nor give any essential facts showing that she has any definite knowledge that the defendant practiced prostitution.

Lily Chan testifies that she became acquainted with the defendant in the latter part of 1921. She says the defendant lived at 719 Sacramento Street from 1921 until May, 1923. The latter date is the time this witness went to the mission and she did not see the defendant thereafter. This witness stated that she does not know of any particular hotel or rooming house where the defendant practiced prostitution; that all she knows is that she has seen the defendant "solicit" at banquets, and when pressed for something more definite, she contradicted her former statements and stated that she

has seen the defendant practice prostitution at the Grand View Hotel but cannot remember when. It is not necessary to comment on her testimony. She either committed perjury in her original statement or in the later statement.

As heretofore mentioned, the only evidence in support of the charges against this defendant, is the testimony of four self-confessed ex-prostitutes and law breakers, apparently produced at the instance of Miss Cameron, who made the misleading statement which formed the basis for the issuance of the warrant of arrest. Three of said witnesses are aliens and are in this country in violation of law. They have each sworn that she practiced prostitution after her entry into this country. Section 19 of the Immigration Law of 1917, provides:

> "Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

This country is coming to a dangerous pass if aliens of the type and character of these witnesses may control the destinies of native-born American citizens, and, upon their unsupported statements, break up his home and have his wife deported to China, while they, who confess to being guilty of the same crime with which they charge this defendant, remain immune from prosecution and live on the charity of the American people.

So far as can be determined from the record, no two of said witnesses testified to the same act of alleged prostitution. Thus the proof fails to support even a single act of alleged prostitution for on the one side, supporting the charge, is only the testimony of one self-confessed law breaker, and on the other side, is the positive and unequivocal denial of the defendant who is presumed to be innocent until proven guilty, and her testimony, as we will hereinafter show, is corroborated in part by other testimony and by certain facts and circumstances. The burden of proof is on the Government and it has not been sustained. Prostitution must be proved in the same way as any other offense and it cannot be proved by the conjecture of a single witness regarding any specific act when such testimony is rebutted with more weighty evidence. The decision of the Secretary of Labor must rest upon *facts* proved and cannot rest upon mere surmise, speculation, conjecture or suspicion.

No. 34 Beckett Alley was not a house of prostitution, and was not known as such by the police department. The keeper of said apartments was arrested at the same time as this defendant, tried in Police Court and acquitted.

The husband is an American citizen. He works in a laundry at 145 8th Street, San Francisco, from 7 in the morning until 10 at night, and only went home regularly on Saturday nights, and occasionally at other times. His board and lodging was

furnished by the owner of the laundry and it was part of the work that he sleep at the laundry. He paid $12 per month for the two rooms occupied by his wife at Beckett Alley, and he had a charge account for her at the Tong Chong grocery store where she could get whatever she needed, and he paid the bill every Sunday. He says he is positive his wife never attended any tong banquets. He paid for everything. That she has no jewelry, except a diamond ring he gave her, and she has no gaudy or expensive clothes.

The Immigration inspectors never fail to lay great stress upon the conduct, personal appearance and manner of women defendants and applicants for admission who are suspected of being prostitutes. They are absolutely silent in this respect concerning the present defendant, from which it must be inferred that she possessed none of the traits or appearances indicating that she was an immoral woman. Detective Sergeant Manion who arrested this defendant and the woman who was found in bed with her, admitted that nothing immoral was found in the rooms occupied by the defendant.

There is a possibility that the four witnesses from the mission made a mistake in the identification. It will be noted that Officer Floyd made such mistake. From a photograph exhibited to him he identified this defendant as a person he had seen at many tong banquets, but when he saw the defendant in

person, candidly admitted he had made a mistake. The four witnesses from the mission had previously identified the defendant from a photograph and informed Miss Cameron that they knew her. Even if they realized that they had made a mistake, unlike Officer Floyd, they did not have the courage to admit it for fear of the consequences. If Officer Floyd, who is accustomed to making identifications from photographs, could make a mistake of this kind, it is very evident that persons who are not accustomed to making such identifications, are much more likely to make a mistake.

The testimony at the most creates only a suspicion which is not sufficient to warrant an order of deportation. This had been decided by the Circuit Court of Appeals for the 9th Circuit in *Chan Kam v. United States,* 232 Fed. 855, and the opinion is very illuminating on the whole subject. That case is a far stronger case for the Government on the facts than the case at bar, yet this Court considered and weighed the testimony and even though the lower Court had denied the writ, granted the writ and discharged the woman. We suggest that a careful reading of the case will guide the Court in arriving at a similar conclusion in the present case. The Court said:

> "We think this objection to the proceedings is well taken. It appears from the examination to which reference is made that Chan Kam was married and was living with her husband. She was asked by the Immigration officer:

'When you were arrested, at that time you were found in bed with a Chinaman who was not your husband?

No; I was standing beside the bed, and the man was in the bed.'

She was then told that the officers who arrested her said she was in bed with Jew Lin when she was arrested. She answered:

'That is not true. I was standing beside the bed.'

She was asked:

'Had you been in bed with the man before the officers came into the room?'

She answered: 'No'.

She was then asked:

'What were you doing in the room with the door closed at that time of the night (9 o'clock) and a strange man in your bed, with your husband absent?'

She answered:

'It was my room and bed, and Jew Lin was in bed, waiting for my husband.'

It is contended by the government that this testimony is evidence of improper relations with the man with whom she was found and arrested, and proof that she was engaged in the practice of prostitution; but the testimony of the officers who made the arrest is not in the record, and we do not know from them what the situation of the parties was at the time the arrest was made. In that aspect of the evidence there is, at most, only a suspicion, which is not sufficient. The testimony of Chan Kam is that she is married; that one Ho Bat is her husband; that she was not a prostitute, and had never practiced prostitution, and was not at the time of her arrest, or at any other time, an inmate of a house of prostitution. In this testimony she was corroborated by the testimony of Ho Bat, her husband. Jew Lin, whose

visit was the cause of her arrest, testified he was not in Chan Kam's bed, but sat on the corner of her bed, because there was no chair in the room. He had been invited by Ho Bat to visit him, and had done so pursuant to his invitation, and had been in the room only about three minutes when the arrest was made. Two Chinese witnesses who occupied an adjoining room in the building testified that Chan Kam was not a prostitute, and had not practiced prostitution. This evidence is not contradicted by any direct testimony. The case therefore rests upon a supposed statement made by Chan Kam concerning Jew Lin, which appears to have been incorrect, probably because of an incorrect interpretation. The statement, whatever it was, appears to have been obtained by an unfair examination of Chan Kam by the officers.

We think the rule applicable in this case was stated by this court in Ong Chow Lung v. Alfred E. Burnett, 232 Fed. 853, C. C. A. decided at the present term of court:

'It is not our function to weigh the evidence in this class of cases, but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair, and subject to judicial review. Whitfield v. Hanges, 222 Fed. 745, 751 (138 C. C. A. 199); McDonald v. Siu Tak Sam, 225 Fed. 710 (140 C. C. A. 584); Ex parte Lam Pui (D. C.) 217 Fed. 456.'

Judgment reversed, and the cause remanded, with instructions to discharge the appellant from custody."

III.

THAT THE ISSUANCE OF THE ORDER FOR ARREST IS UNSUPPORTED BY THE PROPER SHOWING AS REQUIRED BY SECTION 18 OF THE IMMIGRATION RULES.

On page three of the amended petition, lines 8 to 22, Rule 18 is set out, which requires in substance, that the application for the warrant of arrest "should be accompanied by some supporting evidence" and the "application should be accompanied by the affidavit of the person giving the information or a transcript of a sworn statement taken from that person by an inspector". A sworn statement of Donaldina Cameron is the basis for the issuance of the order, and in it the only charge against this petitioner is "and when we entered the premises this morning we found Chew Ling (a woman) in bed with Chan Ah Ho (this detained), who is known to the Chinese girls in the Mission as a prostitute". This statement is only hearsay at the most, and it is impossible to ascertain whether it refers to Chew Ling being a prostitute or Chan Ah Ho, and is an imposition upon the Secretary of Labor. It was evidently intended to convey the impression that this defendant was found in bed with a man, whereas the record shows said Chew Ling was a woman.

That the showing was insufficient for the purpose of issuing a departmental warrant, we cite the following case:

Ex parte Avakian, 188 Fed. 688.

"A letter written by a U. S. Immigration Commissioner in Canada to a Commissioner at Boston requesting the issuance of a warrant for an alien's arrest in Massachusetts, and stating facts tending to a conclusion that when alien was admitted at Halifax she must have been diseased, was insufficient to show as a basis for the Secretary's warrant for the alien's arrest, an application therefor not complying with Immigration Regulations Rule 35, paragraph 3b."

See also:

U. S. ex rel. Bilokumsky v. Tod, supra.

CONCLUSION.

In conclusion we cannot too strongly urge upon this Court that the appellant has been denied a fair hearing by the refusal of the Commissioner of Immigration to subpoena the witnesses necessary for the defense against the charge. The law gives her that right—the rule of the Department provides for the machinery. When the Supreme Court called the attention of Congress to the fact that there was no provision for the subpoenaing witnesses in *Low Wah Suey v. Backus,* supra, so abhorrent was the proposition that Congress immediately extended that right. Notwithstanding the law the Commissioner of Immigration refuses to issue subpoenaes and takes upon himself the power to investigate a witness for whom the subpoena is asked and prejudge his testimony. In no other proceeding in the

land is it a prerequisite to obtaining a subpoena necessary to announce "what the witness is going to testify to". This is not a "fair hearing",—it is a star chamber proceeding.

Under all the circumstances in this case to have refused to issue the subpoena was to render the hearing manifestly unfair, and the judgment of the lower Court should be reversed and the writ granted.

Dated, San Francisco,
October 7, 1925.

Respectfully submitted,

J. H. Sapiro,
Attorney for Appellant.

No. 4636

10

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

GEORGE J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.

Parker Printing Company, 523 Clay Street, San Francisco.

No. 4636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHUN SHEE,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from an order of the District Court of the Northern District of California dismissing a petition for habeas corpus. The proceeding was there brought to test the validity of the previous order of the Department of Labor directing the deportation of appellant under the

provisions of Section 19 of the Act of February 5, 1917 (39 Stat. 889).

The petition filed on behalf of appellant on May 23, 1925, was demurred to by respondent. On June 16, 1924, the demurrer was sustained and the application for a writ denied, and the petition dismissed.

The petition as amended, according to its terms, sets up and makes as a part thereof as Exhibit "A" the usual immigration record of the case. This record has been sent to the Clerk of this Court.

The detained arrived at the port of San Francisco October 18, 1921, and was admitted as the wife of a native born citizen (Ex. A, p. 4).

On August 19, 1924, a Miss Cameron gave a statement as to the detained being found in the raid of certain premises at 34 Beckett Avenue (Ex. A, p. 5).

Thereupon on September 3, 1924, a warrant of the Assistant Secretary of Labor was issued for her arrest under the provisions of the Immigration Act for the reason "that she has been found practicing prostitution after her entry" (Ex. A, pp. 1-3).

The application for the warrant of arrest was made by the Acting Commissioner of Immigration at the port of San Francisco, accompanied by the verification of landing of the detained, the statement of Miss Cameron; also statements of detained taken August 19, 20, and 21, 1924 (Ex. A, p.11).

On September 16, 1924, the matter was called for hearing before an Immigration Inspector, the detained being present with counsel (Ex. A, p. 58). Thereupon at the request of counsel the matter was continued to a later date; on November 24, 1924, the detained being present, accompanied by her counsel, the matter was heard before an examining inspector. The sworn statement of the detained was taken; also the testimony of Rose Wong, Lily Lum, Lung Ah Sung and Lily Chan. There was also submitted the testimony of Lee Ah Cheong, the husband of the detained, and of Lung Sung Yow. Thereupon at the request of counsel for the detained, the matter was postponed for a few days for further hearing in order to "make an investigation".

On December 9, 1924, further testimony was given on rebuttal by the detained, at the close of which her counsel made a statement appearing at page 25 of Exhibit "A". He said "I would like to make a statement *for* the *record* to *lay a foundation* for the *premises* for *an investigation* on the *part* of the *immigration authorities* to have a subpoena issued on behalf of the defense in this case". It was further said that counsel after the conclusion of the last hearing had gone to 719 Sacramento Street, one of the places mentioned in the testimony, and there found one Lee Yick, the manager, and that he was told by Lee Yick that he had never met the

defendant at the place; that Lee Yick refused to accede to counsel's request that he attend and give testimony and that his testimony and the testimony of other members of the store is vital. Further when asked by the inspector if the case was closed, counsel responded, "Yes, with the exception of our request just made by Mr. Stidger" (Ex. A, p. 24).

On the same day examining Inspector Benson took the statements of Police Officers Manion and Floyd, also the statement of Lee Lim at 719 Sacramento Street. In the statement of Lee Lim he said that he was manager of the store there and that while he knew Lee Yick, Lee Yick was not manager, nor had he any interest in the store (Ex. A, p. 31).

On December 12, 1924, Inspector Benson reported to the Commissioner that in response to request of counsel for the detained he went to 719 Sacramento Street and found Lee Lim who stated he was the manager of the firm since 1920, and that, while he knew Lee Yick, he was not connected with the firm in any manner. The Inspector also obtained the partnership list filed at the Island, and that the name of Lee Yick does not appear on the same. The inspector further took the statements of two police officers and suggested that a date be set for a further hearing in order that the statements might be made a part of the record, as well as the statement of Lee Lim and the partner-

ship list, adding that if the attorneys for detained so desired, Police Officers Manion and Floyd would be produced for cross-examination (Ex. A, pp. 19, 18).

The matter came on for further hearing before the Inspector, December 30, 1924 (Ex. A, pp. 23, et seq.). The statements of the two police officers were introduced, also the statement of Lee Lim; these without objection. Thereupon the two police officers were examined and cross-examined by counsel. At the close of this examination the inspector asked counsel for the alien *"is your case now closed?"* The response was *"yes"*. Counsel made no further request, and the matter being submitted, the inspector stated that the charge contained in the warrant had been sustained and recommended deportation.

Upon a review of the testimony and proceedings, the Secretary of Labor concurred in the recommendation and ordered the deportation.

As grounds for the petition for the writ it is alleged that the hearing before the Department of Labor was unfair in three respects:

(a) That there were deficiencies in the original showing to obtain the warrant in that it was based upon the statement of one Donaldina Cameron which was not verified.

(b) That the evidence contained in the exhibit "was of such a conclusive kind and character" as

to establish the fact that the detained was not guilty as charged, and that it was an abuse of discretion on the part of the Secretary to make the order and refuse to be guided by the evidence.

(c) That the Department refused to subpoena certain witnesses on behalf of the detained, and Section 16 of the Immigration Act, and subdivisions (a) and (b) of Rule 23 of the Rules of February 1, 1924 are cited at length as not having been complied with; it is further said that the detained did not have an opportunity to cross-examine certain witnesses examined by an inspector.

In the printed brief filed on behalf of the detained three propositions are argued.

I. (a) That the Commissioner of Immigration refused to subpoena certain witnesses after request therefor was made by petitioner.

(b) That appellant was not given an opportunity to cross-examine one witness Lee Lim.

II. That the order of deportation was not based upon sufficient evidence.

III. That the warrant for arrest was unsupported by a proper showing required by the Immigration Rules.

We shall discuss these propositions in order.

ARGUMENT.

I.

THE COMMISSIONER OF IMMIGRATION DID NOT REFUSE TO SUBPOENA ANY WITNESSES REQUESTED BY THE DETAINED; THERE WAS NO REQUEST MADE.

It is said that the hearing before the Department was unfair in that the Commissioner refused to subpoena for the detained a certain witness, to wit, one Lee Yick, and the provisions of Section 16 of the Immigration Act of 1917 and of Rule 23 promulgated by the Secretary under that Act are invoked (Brief of Appellant, p. 8). A portion of the rule is printed by counsel, but it is apparent that he has overlooked a material portion thereof. Rule 23, effective February 1, 1924, and at the time of the hearing, and which is also the present rule, is as follows (italics ours):

> "Rule 23.—Subpoenaing Witnesses.
>
> Subdivision A.—When power exercised.
>
> Paragraph 1.—The provision of section 16, act of February, 1917, authorizing commissioners of immigration and inspectors in charge to subpoena witnesses and require the production of books, papers, and documents is intended to aid, not to impede, the immigration officers in the performance of their duties. The power to issue subpoenas will be exercised, therefore, only when absolutely necessary. Whenever an inspector conducting an investigation or a board of special inquiry holding a hearing is of opinion that a certain witness whose testimony is deemed essential to a proper decision of the case will not appear and testify or produce books, papers, and docu-

ments unless commanded to do so, such inspector or the chairman of such board shall request the commissioner or inspector in charge to issue a subpoena and have it served upon such witness. *If an alien or his authorized representative requests that a* witness be subpoenaed, he shall be required, as *conditions precedent* to the granting of the request *to state in writing what he expects* to *prove* by such *witness* or the books, papers, and documents indicated by him and to show affirmatively that the proposed evidence is *relevant* and *material* and that he has made diligent efforts without success to produce the same. The examination of the witness or of the books, papers, and documents produced by him shall be limited to the purpose specified in the written assignment of the alien or his authorized representative. But when a witness has been examined by the investigating officer and counsel has not had an opportunity to cross-examine such witness and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a subpoena shall issue."

These rules are promulgated by the Secretary under the authority of law and thus have the force of law. The rule is reasonable, in fact the very rule is invoked by counsel as the foundation of applicant's claim. Testing the case by this rule, it is seen that there was no compliance whatever, that no request in writing was made for a subpoena; indeed the facts show that there was no regular request whatever. It will be observed that counsel did not request the subpoena, even verbally, he merely asked to "lay a foundation for the premises

for an investigation'' on the part of immigration authorities to have the subpoena issued. The immigration authorities did so investigate forthwith, and, according to the report, found that the alleged witness was not truthfully stating that he was the manager of the store in question. The inspector having so reported, counsel made no further reference to the matter. Indeed, at the close of the examination, when the inspector asked if that was the end of his case, counsel responded ''yes''. There was no suggestion of any further proceeding, or of the necessity for taking any further testimony. Neither was there any request for the cross-examination of Lee Lim, or of any other absent witness, nor was there any request for any subpoena to issue to bring in any witness. At that time counsel had seen the report of the examiner to the effect that Lee Yick could not truthfully testify as claimed. He may well have concluded that since the production of a witness who would testify falsely would prejudice his whole case, that it was the part of prudence not to pursue the matter further. Thus the record is clear that the rule invoked was in no respects complied with; that there was not even a categorical verbal request for the subpoena, there was merely the suggestion of a preliminary investigation, this being had and the adverse result reported, counsel did not further pursue the matter, but affirmatively stated that his case was closed.

As to the further point made that there was no opportunity to cross-examine Lee Lim, it is sufficient to answer that according to the record no such request was ever made. The statement of Lee Lim was clear and it may well be assumed that counsel, having read it, became satisfied that cross-examination could not have had any result favorable to himself.

The recent opinion of this court in the case of

Yip Wah v. Nagle, Number 4551,

discusses to some extent the failure to produce a witness for cross-examination. It was held in that case that the situation did not render the hearing unfair. There the statements were received in evidence over objection; here the evidence of Lee Lim was received without objection. Then there was a request for cross-examination; here there was no request. There the Department was said to have satisfactorily shown an inability to produce; here counsel did not even request production.

It is quite clear that there was nothing in this assignment that should be taken to render the hearing unfair; that so far from the Department violating one of its own rules the situation is that the applicant did not comply with the rule or properly, or even in any manner, request the subpoena.

II.

THE EVIDENCE WAS NOT INSUFFICIENT TO JUSTIFY THE ORDER OF DEPORTATION.

It is a familiar rule that neither this court nor the District Court has the function of weighing the evidence taken before the Department of Labor in this class of cases. They may only consider whether there was any evidence to sustain the conclusion of the secretary.

Testing the proceedings by this rule and by the authority cited by appellant, it is quite clear that it was proven at the deportation hearing that the applicant had since her entry into the United States been found practicing prostitution. The testimony of the four witnesses, Rose Wong, Lily Lum, Lung Ah Sung, and Lily Chan (Ex. A, pp. 53-39), has amply such tendency and effect.

This court has recently said in a similar case, the case of

Wong Shee v. Nagle, Number 4541:

> "It is unnecessary to set forth the testimony tending to show that the petitioner, Wong Shee, alias Chew Wah, practiced prostitution, and was an inmate of a house of prostitution after her arrival in the United States. It was direct and positive as to time, place and circumstances. The character of the witnesses, and whether they told the truth, were matters for the consideration of the immigration authorities and we cannot disturb their conclusions."

Here the testimony was given by certain Chinese women who were formerly associates of the detained and knew her mode of living. They subsequently entered a rescue mission and at the time of testifying had reformed. This latter circumstance may have been properly considered by the Commissioner in appraising the weight of the testimony.

We may say also in passing that there is nothing in the record in the instant case that would justify any adverse comment upon the activities of Miss Cameron in charge of the rescue mission. Nor is there any warrant for the statement that the inmates of this mission testifying "were evidently kept in this country for professional witnesses in this class of cases". Their statements appealed to the Secretary as being true and were sufficient in substance and tendency to establish the case against the detained.

III.

THAT THE ORDER FOR THE WARRANT OF ARREST MAY HAVE LACKED PROPER SUPPORT UNDER THE RULES DOES NOT PREVENT THE SUBSEQUENT HEARING FROM BEING SUFFICIENT AND VALID.

It is contended that in applying for the initial warrant of arrest there was not a sufficient showing made under the rules. But it does not appear that there was any objection made at the time as to the sufficiency of the showing to obtain the arrest.

Thereafter the detained employed counsel and participated in the hearing without question. In any event since there was a fair hearing, any insufficiency as to the showing for the original warrant would not have the effect of invalidating the result of the final hearing.

It is well settled that irregularities in the order or arrest do not affect the status of an alien had on a warrant of deportation after a fair hearing.

U. S. v. Uhl, 211 Fed. 628;
U. S. v. Williams, 200 Fed. 538;
Healy v. Backus, 221 Fed. 358;
Siniscalchi v. Thomas, 195 Fed. 701;
Toy Tong v. U. S., 146 Fed. 343;
Wong Shee v. Nagle, Number 4541.

CONCLUSION.

In conclusion it is submitted that the applicant was properly found guilty of the charges stated in the warrant of arrest, and that a warrant for her deportation properly followed; that there was nothing unfair in the hearing, and that the order was supported by sufficient evidence, and the District Court properly dismissed the petition for a writ of habeas corpus.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 4637

United States Circuit Court of Appeals

For the Ninth Circuit.

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Inspector of the Port of Honolulu, Hawaii,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4637

United States

Circuit Court of Appeals

For the Ninth Circuit.

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Inspector of the Port of Honolulu, Hawaii,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For the Applicant, Takeyo Koyama:
LIGHTFOOT & LIGHTFOOT, McIntyre Building, Honolulu, Hawaii.

For the Respondent, A. E. Burnett, Esq., Immigration Inspector in Charge at the Port of Honolulu:
CHARLES F. PARSONS, Esq., United States District Attorney, Federal Building, Honolulu, Hawaii. [1*]

In the United States District Court for the Territory of Hawaii.

No. 188.

In the Matter of the Application of TAKEYO KOYAMA for a Writ of Habeas Corpus.

CLERK'S STATEMENT.

Time of Commencing Suit:

August 7, 1923: Petition for writ of habeas corpus filed and alternative writ of habeas corpus issued to the United States Marshal for the District of Hawaii.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

Names of Original Parties.

TAKEYO KOYAMA, Applicant.

RICHARD L. HALSEY, Respondent (now deceased), succeeded by A. E. BURNETT, Immigration Inspector in Charge at the Port of Honolulu, T. H.

Dates of Filing of Pleadings:

August 7, 1923: Petition for writ of habeas corpus.

Service of Process.

August 7, 1923: Alternative writ of habeas corpus issued and delivered to the United States Marshal for the District of Hawaii. Thereafter the following return was made by the said United States Marshal, to wit:

"United States Marshal's Office.

MARSHAL'S RETURN.

The within writ of habeas corpus was received by me on the 7th day of August, A. D. 1923, and is returned executed this 7th day of August, A. D. 1923, upon Richard L. Halsey, U. S. Immigration Inspector in charge of Immigration at the Port of Honolulu by exhibiting to him the original alternative writ of habeas corpus, and by handing to and leaving with him a certified copy of the same.

OSCAR P. COX,
United States Marshal.
By (S.) M. F. Mattson,
Deputy.

Dated at Honolulu this 7th day of August, A. D. 1923." [2]

Time When Proceedings Were Had:

August 25, 1923: Order of continuance to enable respondent to file return.

March 13, 1924: Order of continuance for argument on demurrer.

March 18, 1924: Argument on demurrer and continuance for further argument on said demurrer.

March 19, 1924: Further argument on demurrer and cause taken under advisement.

February 13, 1925: Order granting applicant time to prosecute appeal.

Dates of Filing Appeal Documents:

March 2, 1925: Petition for appeal and admission to bail pending appeal, assignment of errors, order allowing appeal and releasing prisoner on bail.

March 7, 1925: Supersedeas bail bond; appeal bond for costs.

March 13, 1925: Praecipe.

March 2, 1925: Citation issued.

Proceedings had before the Honorable J. B. POINDEXTER and the Honorable WILLIAM T. RAWLINS, Judges.

The judgment in the above-entitled cause was filed and entered on February 21, 1925. [3]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO THE ABOVE STATEMENT.

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties thereto and those who have become parties before the appeal, the several dates when the respective pleadings were filed; an account of the service of process herein, the time when proceedings were had and the names of the Judges presiding; the date of the filing and entering of the final judgment and date when the petition for appeal was filed and citation issued in the above-entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of May, A. D. 1925.

[Seal] WM. L. ROSA,
Clerk, United States District Court, Territory of Hawaii. [4]

In the District Court of the United States in and for the Territory of Hawaii. In the Matter of the Petition of Takeyo Koyama, for a Writ of Habeas Corpus. Petition for Writ of Habeas Cor-

pus. Filed Aug. 7, 1923, at —— o'clock and 25 minutes P. M. (Sgd.) Wm. L. Rosa, Clerk. Lightfoot & Lightfoot, Attorneys for Petitioner McIntyre Building, Honolulu. [5]

In the District Court of the United States in and for the Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable J. B. POINDEXTER, Judge of the District Court of the United States in and for the District and Territory of Hawaii:

The petition of Takeyo Koyama respectfully shows unto your Honor as follows:

I.

That petitioner was born in the prefecture of Hiroshima, Empire of Japan, and is a subject of the Emperor of Japan.

II.

That petitioner first arrived at the port of Honolulu on the 18th day of May, 1918, and upon her arrival was married according to the laws of the Territory of Hawaii to Matsuichi Koyama, and the said Matsuichi Koyama was born in the Territory of Hawaii on the 18th day of August, 1892, and holds certificate of Hawaiian birth No. 9447, issued July 27, 1918, by the Honorable Curtis P. Iaukea, Secretary of Hawaii, and is a citizen of the United States of America; that the said Matsuichi

Koyama is now residing in the City of Los Angeles, State of California.

III.

That your petitioner is a musician and is able to play Japanese music on several kinds of stringed instruments and is able to [6] make a living by following the profession of a musician.

IV.

That your petitioner left the Territory of Hawaii on the 26th day of June, 1922, for the purpose of taking the child of her, the said Takeyo Koyama, and the said Matsuichi Koyama, born as the issue of the said marriage, to Japan for the purpose of having said child placed in the care of the petitioner's aunt, and that when petitioner left for Japan as aforesaid she intended to return to Hawaii, remain in Hawaii a short time and then proceed to Los Angeles, State of California, to join her husband.

V.

That petitioner, before leaving Hawaii for the Empire of Japan, as aforesaid, and on to wit, the 21st day of June, 1922, signed and verified under oath before a Notary Public of the First Judicial Circuit of the Territory of Hawaii, an affidavit alleging the marriage, as aforesaid, and the American citizenship of the husband of said petitioner, a copy of the affidavit being hereto attached and made a part hereof, marked Exhibit "A" and to which reference is hereby made; that attached to the said affidavit is the certificate of the Honorable Harry Irwin, then Attorney General of the Terri-

tory of Hawaii, to the effect that the Notary Public taking the oath of said petitioner was duly authorized so to do, a copy of which certificate is hereto attached and made a part hereof, marked Exhibit "B" and to which reference is hereby made.

VI.

That before leaving the Empire of Japan and returning to the Territory of Hawaii, petitioner visited the Consulate of the United States at the port of Yokohama, Empire of Japan, and took and subscribed on oath before Paul E. Jenks, Esq., Vice-Consul of the United States of America at Yokohama, Japan, to the effect that [7] petitioner is the same person mentioned in the affidavit above referred to and that it was the intention of petitioner to depart from the port of Yokohama, Japan, on board the steamship "Tenyo Maru" scheduled to sail on the 6th day of June, 1923, for the purpose of returning to Honolulu, Hawaii, to join her husband, Matsuichi Koyama, an American citizen; that said affidavit, Exhibit "A," was filed by petitioner with the American Consul at the port of Yokohama, and is referred to in the affidavit signed by petitioner before said Vice-consul, and that said affidavit contained the photograph of petitioner; that a copy of said affidavit so taken at the American Consulate at the port of Yokohama, as aforesaid, is hereto attached and made a part hereof, marked Exhibit "C" and to which reference is hereby made.

VII.

That upon the presentation of the affidavit Exhibit "A" and the signing of the affidavit Exhibit "C," your petitioner was informed by the Viceconsul of the United States at the port of Yokohama, that in view of the fact that your petitioner is the wife of an American citizen, no passport would be required and accordingly petitioner left the port of Yokohama on board the steamship "Tenyo Maru" on or about the 6th day of June, 1923, bound for the port of Honolulu, bearing the affidavits aforesaid and without the passport issued by the Government of Japan.

VIII.

That upon arrival at the port of Honolulu on or about the 16th day of June, 1923, a United States Immigration Inspector, whom petitioner is informed and believes and therefore alleges the fact to be, is Jackson L. Milligen, examined your petitioner, and acting alone, the said Jackson L. Milligen, United States Immigration Inspector, as aforesaid, held your petitioner for examination [8] before a Board of Special Inquiry at the port of Honolulu.

IX.

That on the 16th and 18th days of June, 1923, your petitioner was examined by a Board of Special Inquiry at the Immigration Station, Honolulu, a copy of the proceedings had before said Board being hereto attached and made a part hereof, marked Exhibit "D," and to which reference is hereby made.

X.

That upon the conclusion of the examination before the Board of Special Inquiry, as aforesaid, your petitioner was informed by Edwin Farmer, a United States Immigration Inspector, and a member of said Board of Special Inquiry, that your petitioner was denied a landing in the United States and was ordered deported to the country whence she came, to wit, the Empire of Japan, and petitioner was further informed that she had right to appeal from the decision of said Board of Special Inquiry to the Secretary of Labor.

XI.

That thereupon petitioner signed an appeal to the Secretary of Labor prepared for her signature by the Immigration officers at said port of Honolulu, she, the said petitioner, being unrepresented by counsel in her said appeal; that a copy of said appeal is hereto attached and made a part hereof, marked Exhibit "E" and to which reference is hereby made.

XII.

That petitioner is informed and believes and upon such information and belief alleges and avers that said appeal was duly forwarded to the Secretary of Labor by Richard L. Halsey, Esq., United States Immigration Inspector in Charge at the port of Honolulu, and that said Inspector in Charge forwarded to the Secretary of Labor, in addition to the said appeal, a statement of the case, [9] a copy of which is hereto attached and made a part hereof,

marked Exhibit "F" and to which reference is hereby made.

XIII.

That your petitioner is informed and believes and upon such information and belief alleges and avers that on the 17th day of July, 1923, one, G. G. Tolman, Immigrant Inspector acting for the Commissioner General at the office of the Department of Labor, Washington, D. C., informed the said Inspector in Charge at the port of Honolulu, that "the Acting Secretary has affirmed the excluding decision of the Board of Special Inquiry"; that a copy of the letter so informing the said Inspector in Charge is hereto attached and made a part hereof, marked Exhibit "G" and to which reference is hereby made.

XIV.

That your petitioner is now imprisoned, restrained and deprived of her liberty by the said Richard L. Halsey, Esq., United States Immigration Inspector in Charge at the port of Honolulu, at the United States Immigration Station, Honolulu, and your petitioner is informed and therefore alleges the fact to be, that she is so imprisoned, restrained and deprived of her liberty under the said holding of said Board of Special Inquiry at the Port of Honolulu, affirmed by the Acting Secretary of Labor in the letter of said G. G. Tolman above referred to, and your petitioner is further informed and believes and upon such information and belief alleges and avers that it is the intention of the said Richard L. Halsey, Esq., United States Inspector in

Charge, as aforesaid, to deport your petitioner to the Empire of Japan by the first steamer available for that purpose.

XV.

That said imprisonment, restraint and confinement is illegal for the following reasons: [10]

First: Your petitioner was held to appear before the Board of Special Inquiry by one Immigration Inspector, to wit, by Jackson L. Milligen, contrary to the provisions of Subdivision I, Rule III of the Immigration Rules of May 1, 1917.

Second: That the hearing before the Board of Special Inquiry, as aforesaid, was not a fair and impartial hearing but was an unlawful and partial hearing and constituted the mere semblance of a hearing.

Third: That as a matter of law the findings of the Board of Special Inquiry were illegal for the reason that it failed to take into account the fact that your petitioner is the wife of an American citizen and therefore has the right to enter the United States of America without a passport.

Fourth: That the document verified before the Vice-Consul at Yokohama, Japan, as aforesaid, is the equivalent of a passport and gave the right to petitioner of entry into the United States.

WHEREFORE, petitioner prays that a writ of habeas corpus issue out of this Honorable Court directed to Richard L. Halsey, Esq., United States Immigration Inspector in Charge at the port of Honolulu, commanding him, the said Richard L. Halsey, to produce the body of your petitioner be-

fore this Honorable Court to the end that the said imprisonment, restraint and confinement of your petitioner may be inquired into and that upon a hearing of said writ of habeas corpus the same may be made perpetual and your petitioner discharged thereunder; and for such other and further relief as to this Honorable Court shall seem meet in the premises.

Dated at Honolulu, T. H., this 6th day of August, 1923.

(Sgd.) TAKEYO KOYAMA.
Petitioner. [11]

United States of America,
Territory of Hawaii,—ss.

Comes now Takeyo Koyama, and being first duly sworn on oath, deposes and says; that she is the petitioner above named; that she has read the foregoing petition for a writ of habeas corpus and knows the contents thereof, and that the same is true, except as to the matters therein alleged on information and belief, and as to these, she believes them true.

(Sgd.) TAKEYO KOYAMA.

Subscribed and sworn to before me this 6th day of August, A. D. 1923.

[Seal] (S.) JIUNKI MAEDA,
Notary Public, First Judicial Circuit, Territory of Hawaii. [12]

EXHIBIT "A."
COPY.

Territory of Hawaii,
City and County of Honolulu.

Takeyo Koyama, being first duly sworn on oath

deposes and says; That she is a subject of the Japanese Empire; that she arrived in the Hawaiian Islands on May 18, 1918; that she married one Matsuichi Koyama in June, 1918, by the Rev. C. Sakai; that said Matsuichi Koyama, husband of said Takeyo Koyama is a citizen of the United States *having born* in the Hawaiian Islands on August 18, 1892; that said Takeyo Koyama intends to depart temporary for Japan for her health; that said Matsuichi Koyama holds Hawaiian Birth Certificate No. 9447 issued July 27, 1918 by Honorable C. P. Iaukea, Secretary of Hawaii.

(Signed) TAKEYO KOYAMA.

Subscribed and sworn to before me this 21st day of June, A. D. 1922.

(Signed) P. SILVA,

Notary Public, First Judicial Circuit, Territory of Hawaii. [13]

EXHIBIT "B."

COPY.

TERRITORY OF HAWAII.

Office of the Attorney General.

WHEREAS, Under and by virtue of an Act of the Congress of the United States of America, entitled "An Act to provide a Government for the Territory of Hawaii," approved on the 30th day of April, 1900, the appointment and removal of all notaries public within and for the Territory of Hawaii was vested solely in the Attorney General of said Territory:

NOW, THEREFORE, I, Harry Irwin, of Honolulu, City and County of Honolulu, Territory of Hawaii, the duly appointed, commissioned, qualified and acting Attorney General of said Territory, do hereby certify that Patrick Silva of Honolulu, County of Honolulu, Territory of Hawaii, was on the 23d day of January, A. D. 1907, duly appointed and commissioned as a Notary Public for the First Judicial Circuit of the Territory of Hawaii; that on the 21st day of June, A. D. 1922, his commission as a notary public remained in force and unrevoked, and that on said day he had full power and authority under the laws of the Territory of Hawaii to act as a notary public in said First Judicial Circuit of said Territory and to administer oaths, and to take and certify acknowledgments of deeds and other conveyances of land in said Territory. That I am acquainted with his handwriting and verily believe that the signature appended to the foregoing instrument is his signature.

IN WITNESS WHEREOF, I hereunto set my hand and have caused the seal of my office to be affixed this 21st day of June, A. D. 1922.

[Seal of Attorney General.]

(Signed) HARRY IRWIN,
Attorney General of Hawaii. [14]

EXHIBIT "C."

COPY.

Empire of Japan,
Prefecture of Kanagawa,
City of Yokohama,
Consulate General of the
United States of America,—ss.

Takeyo Koyama, first being duly sworn on oath, doth depose and say that she is the same and identical Takeyo Koyama mentioned in her own affidavit made before the Notary Public, First Judicial Circuit, Territory of Hawaii, dated June 21, 1922, and duly certified by the Attorney General and Secretary of Hawaii, now in her possession; that it is her intention to return to Honolulu, Hawaii, to join her husband, Matsuichi Koyama, an American citizen, taking passage on the SS. "Tenyo Maru" scheduled to sail from Yokohama, June 6, 1923; that attached hereto is a photograph of her taken in Yokohama this day.

(Signed) TAKEYO KOYAMA.
TAKEYO KOYAMA.

Subscribed and sworn to, and the above-mentioned affidavit produced before me this fifth day of June, 1923.

(Photograph.)

(Signed) PAUL E. JENKS,
P. E. JENKS,
Vice-Consul of the United States of America, at Yokohama, Japan.

AMERICAN CONSULATE GENERAL
American Consular Service, $2. June 5, 1923.
Fee Stamp. Yokohama, Japan.
Consular Seal. SERVICE No. 5289.
[15]

EXHIBIT "D."

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of Inspector in Charge,
Honolulu, Hawaii.

No. 1.

Record of Board of Special Inquiry, convened June 16, 1923.

Members of Board; EDWIN FARMER, Chairman; LOUIS CAESAR and LOUIS N. LAND. Interpreter, T. KATSUNUMA.

Case of TAKEYO KOYAMA, 11–5, ex SS. "Tenyo Maru," 6116/23.

Note: Applicant has no passport. She presents an affidavit sworn to by herself on June 21, 1922, in Honolulu, to the effect that her husband, MATCUICHI KOYAMA, is an American citizen.

Held for the Board by Inspector, Jackson L. Milligan.

Applicant, sworn by Inspector Farmer, testifies:

Q. What is your name and age?

A. Takeyo Koyama, 22 years old.

Q. Do you desire to have a friend or relative present during this hearing? A. No need.

Q. Is any one traveling with you? A. No.

Q. Where were you born?

A. At Kusatsu Machi, Hiroshima Ken, Japan.

Q. Are you married?

A. Yes. My husband, Matsuichi Koyama, 32 years old, is living in Los Angeles, California.

Q. When were you married to him?

A. June, 1918, in Honolulu.

Q. Were you married by American or Japanese custom? A. American.

Q. Did you have a marriage license?

A. Yes, my husband has it now.

Q. Have you any children?

A. Yes, one son, Shiceki Koyama, 3 years old, born in Honolulu and now at Osaka City, Japan. I have no daughters.

Q. Did you ever have any other husband?

A. No.

Q. Was your husband *every* married before?

A. No.

Q. Can you read and write?

A. Yes. (Passes in reading test.)

Q. Who paid your passage? A. Myself.

Q. Your husband did not pay it?

A. No. But he sent money later.

Q. What has been your occupation?

A. Nothing in Japan. I was a waitress at the Kikizuki Tea House, Vineyard Street, this city.

Q. How long were you a waitress there?

A. Six months.

Q. What do you intend to do if you are admitted here?

A. I don't know. I cannot tell. But it is my intention to go to the mainland some day.

Q. Do you expect to be a waitress in the same or some other tea house again.

A. I have no such intention now.

Q. What kind of work can you do to earn a living?

A. I can play music. I can live on that—Japanese music. I can play on the three stringed and also the 13 stringed instrument.

Q. When did you first come to Hawaii?

A. May 7, 1918.

Q. Were you admitted as a picture bride?

A. Yes.

Q. And then after that you got married under American law, did you? A. Yes.

Q. When did your husband go to Los Angeles?

A. On September 1, 1920.

Q. Did you live with your husband right along here from the time you arrived in Hawaii until he went to Los Angeles? A. Yes.

Q. When did you go back to Japan?

A. I left here June 26th, last year.

Q. Then you did not live with your husband from September, 1920, [16] until you left for Japan in June, last year, and of course you have not been with him since then until now? A. No.

Q. It has been nearly three years since you saw him?

A. Yes. Next September will be three years that I have not seen him.

Q. Did he desert you and go to Los Angeles?

A. Not exactly, no. We have a child and he is going to send for me later.

Q. Was that child born before he went to Los Angeles?

A. The child was seven months old when he went to the mainland.

Q. How is it that you should separate for such a long time and you go to Japan and he to the States?

A. I postponed going to the mainland because we wanted to send my child to Japan, and then I would like to go and join my husband.

Q. Why didn't he take you and the child to the mainland with him?

A. My aunt in Japan said to us, "I will take care of your child."

Q. It has been about a year since you went to Japan. Where have you been staying there?

A. In Tokio and Osaka, also my native town, Kusatsu Machi.

Q. Has your aunt been taking care of the child?

A. Yes.

Q. Why is it that you let your aunt *take of* your child? He is only three years old now and was very young when you took him to Japan.

A. I left my child with my aunt and am going to the mainland to get work.

Q. You do not think very much of your child, do you? A. No.

Q. Does your husband want you to go to Los Angeles? A. Yes.

Q. Have you received any letters from him?

A. Yes.

Q. Have you got any of those letters, showing that he wants you to come?

A. No. I left them in Japan.

Q. Why did you not secure a passport?

A. A hotel-keeper told me that what I have was enough.

Q. Did you go to an American Consul?

A. Yes.

Q. What consul? A. At Yokohama.

Q. What did he say?

A. (Presents an affidavit sworn to by herself before the American Consul at Yokohama, to the effect that her husband is an American citizen and that it is her intention to return to Honolulu to join him. Her picture is affixed.)

Q. Did you tell him that your husband was in Los Angeles? A. No.

Q. Have you any further statement to make?

A. No.

(By Mr. LAND.)

Q. What were you doing in Osaka?

A. My aunt took my child to Osaka and made a home there?

Q. What did you do in Tokio?

A. My aunt and myself were in Tokio with my child. My aunt was cleaning clothes. I was doing nothing.

Q. What is your husband doing in Los Angeles?

A. He is a florist.

Q. Why didn't you go to Los Angeles instead of coming to Honolulu when you left Yokohama?

A. My uncle here, Torakichi Iida, wanted me here.

Q. What is his occupation? A. Fisherman.

Q. Did your husband send you money to go to Los Angeles or to come to Honolulu?

A. To Hawaii.

(By Mr. FARMER.)

Q. What relatives have you in Hawaii?

A. My uncle Iida. That is all. I have many friends here.

Q. Are your parents living? A. Yes, in Japan.

Q. Where do they live? A. At Kusatsumachi.

Q. Has your husband any relatives living in Hawaii? A. No.

(By Mr. LAND.)

Q. Is it not a fact that you and your husband separated and he went to Los Angeles in 1920?

A. No, not that thing.

Q. How much money have you? A. $25.00.

Q. Then if you stay in Hawaii any length of time you will have to do something to earn your living, will you not?

A. No. I will get money from my husband. [17]

Q. What was your husband's occupation when he went to Los Angeles? A. Florist

Q. Was he not an actor? A. No.

(By Mr. FARMER.)

Q. Did you make application to the Japanese Government for a passport? A. No.

Q. Have you a marriage certificate or anything to show that you are legally married to Matsuichi Koyama?

A. No, but I can produce a copy. I can get it from Rev. Kato.

Q. Are you registered in Japan as the *husband* of Matsuichi Koyama? A. Yes.

Q. Has your name been taken from his family record? A. No.

Q. Have you a family record with you?

A. Yes.

(Presents a family record without date. It shows that she was married to Matsuichi Koyama Sept. 8, 1916, and that a child was born to them Feb. 3d, 1920, on Vineyard Street, Honolulu, and said child was registered with the Japanese Consul, Honolulu, on Feb. 12, 1920.)

Q. When did you secure this paper?

A. May 20th, this year.

Q. Were you married by correspondence in 1916?

A. Yes. But I did not come to Hawaii until 1918.

Q. Have you any further statement to make?

A. No.

(S.) TAKEYO KOYAMA.

TAKEYO KOYAMA. [18]

EXHIBIT "D."

COPY.

U. S. DEPARTMENT OF LABOR.
Immigration Service.
Office of Inspector in Charge,
Honolulu, Hawaii.

TAKEYO KOYAMA.
6/18/23.

Applicant, recalled, testifies:

(By Inspector FARMER.)

Q. What was your maiden name?

A. Takeyo Yoshizaki.

STATEMENT BY CHAIRMAN.

I have been to the Board of Health office and find it there recorded that Matsuichi Koyama and Takeyo Yoshizaki were married in Honolulu on June 3, 1918. From this it would appear that the applicant is the lawful wife of her alleged husband, unless she has been divorced from him, and I have not found any record of a divorce.

She is not the kind of a woman whom I would consider desirable as a resident of this country. The occupation in which she has been engaged is one in which the persons engaged in it are often of a questionable character, though not necessarily so. But a woman who states that she does not care for her child and takes him to Japan and gives him in charge of an aunt is certainly not of the highest type of woman, though that is not a fact which

would exclude her from admission. She has lived for about three years separate from her husband, although only married to him five years, and that arouses suspicion, but, like the other facts, does not furnish proof that she is excludable. Then, why did she not go to California instead of to Hawaii if she intends to join her husband? That has not been satisfactorily explained.

While I cannot say that she belongs to one of the regular excluded classes, still she has no passport and should be excluded under the regulations of the Department of State. She is an alien, not a citizen, although married to one alleged to be a citizen. Bureau letter of October 27, 1922, No. 52903/43–B advises that in cases of alien women married to citizens when their governments refuse them passports, regarding them as American citizens, although regarded as aliens by us, the Consul shall have them make an affidavit setting forth the reasons why their own governments refuse them passports and attach the same to Form 228 and vise the latter. In case they arrive without Form 228, they are to be paroled and the matter submitted to the Bureau in order to secure a formal waiver of passport and vise from the State Department. It may have been this regulation which the American Consul at Yokohama had in mind when he took the affidavit from the applicant. But in this case the alien woman married to a citizen was of a race of people ineligible to citizenship and there is no reason to believe the Japanese government would have refused her a passport on the ground that she would be an Ameri-

can citizen. She testifies herself that she did not even apply for a passport. The affidavit does not say that she was unable to procure one, nor state the reasons why one could not be obtained. I think, therefore, that the applicant should be denied and the matter submitted to the Bureau for such action as may be deemed advisable. [19]

LOUIS CAESAR.—I move that the applicant be denied admission to the United States and returned to Japan, the country from which she came, as an alien without a passport, as contemplated in the rules of the State Department, and that we do not recommend a waiver of the passport and vise regulations in this case.

LOUIS N. LAND.—I second the motion.

EDWIN FARMER.—I concur. (To applicant.) You have been denied admission to the United States and ordered returned to Japan, the country from which you came, as an alien without a passport, as contemplated by the regulations of the State Department. From this decision you have the right of appeal to the Secretary of Labor at Washington, and you may also ask for a waiver of the passport and vise regulations in your case under the circumstances. The Board of Special Inquiry, however, do not recommend such waiver. If you are finally deported you will be sent back at the expense of the owners of the steamer on which you came, in the same class as that in which you came, namely, the second class. If you desire to appeal you must notify the Inspector in Charge to that effect within

48 hours and you may appeal either with or without an attorney.

I certify the foregoing to be a correct record.

(S.) EDWIN FARMER,
Immigration Inspector. [20]

EXHIBIT "E."

Honolulu, T. H., June 18th, 1923.

Inspector in Charge
U. S. Immigration Service
Honolulu, T. H.

Having been denied admission to Hawaii by the Board of Special Inquiry, I hereby appeal from their decision to the Secretary of Labor, without the services of an attorney.

(Signed) TAKEYO KOYAMA. [21]

EXHIBIT "F."

U. S. DEPARTMENT OF LABOR.

Immigration Service.

COPY.

4395/198.

Office of Inspector in Charge,
Honolulu, Hawaii.

Honolulu, T. H., June 20, 1923.

TAKEYO KOYAMA—Claiming Admission as the Wife of an American Citizen; also Coming to This Port Without a Passport.

Name—TAKEYO KOYAMA.

Marital status—Married to MATSUICHI KOYMA; 32; living in Los Angeles, California; has one son, SHIGEKI KOYAMA; 3 years old.

Age—22.

Literacy—Can read and write.

Occupation—Waitress and musician.

Citizenship—Citizen of Japan.

Date of Arrival—June 15, 1923.

Steamship—SS. "Tenyo Maru."

Destination—Honolulu, T. H.

Decision of Board—Denied by unanimous vote on June 18th, 1923, a*n* an alien without a passport. Applicant appeals without an attorney.

The reasons for the denial are fully set forth on pages 4 and 5 of the record. The Board finds that this applicant is coming to this port without a passport, as contemplated in the rules of the State Department, and they do not recommend a waiver of the passport and vise regulations.

It will be observed that when applicant made her affidavit before the Vice-consul on June 5, 1923, she presented her affidavit certified to by the Attorney-General and Secretary of Hawaii and on this paper there is a vise of the American Vice-consul at Yokohama, dated July 14, 1922, and there is no reference in the record to this vise, which was prior to Bureau Letter of Oct. 27th, 1922. The presentation of this visaed document may have been relied on by her and possibly by the Vice-counsel on June 5, 1923.

After the answer that she had left her child with her aunt she was asked, "You do not think very much of your child, do you?" she answered, "No."

The Inspector in the memorandum infers from this answer that she does not care for her child and is a woman who has no natural feeling. As I speak the Japanese language and understanding how a question like this might be put by an interpreter with a different understanding from the import that was intended to be conveyed by the Inspector and that the language would be very idiomatic, I asked the Interpreter what expression he used. He stated that he asked her if she was "suspended much in her mind, about the child," which we would freely translate whether she was worried or uneasy about the child and she replied, "No"—she states that by her answer she meant she was not worried because in many ways her aunt knows how to take care of the child better than she would herself. [22]

The same difficulty in translating expressions in regard to thinking is seen in other languages—you may recall, that, in King James version of the Bible there is the translation—"Take no thought for the morrow" the translation of the Revised Version is "Be not anxious," which is beyond question the proper translation. However, this matter does not impress me as being material as the decision is based on the fact that she is an alien without a passport. The appeal is submitted for such action as may com-

mend itself to you in view of the showing in relation thereto.

(Sgd.) R. L. H.,
Inspector in Charge.

RLH/MM.
Mailed 6/22/23. [23]

EXHIBIT "G."

U. S. DEPARTMENT OF LABOR.

Immigration Service.

(COPY.)

Office of Inspector in Charge,

Honolulu, Hawaii.

U. S. DEPARTMENT OF LABOR.

Bureau of Immigration.

Washington.

No. 54976/29. July 17, 1923.

Inspector in Charge,
Immigration Service,
Honolulu, T. H.

The Bureau acknowledges the receipt of your letter No. 4395/108 of June 20th in the case of Takeyo Koyama.

After carefully considering the evidence presented in the record, the Acting Secretary has af-

firmed the excluding decision of the Board of Special Inquiry.

For the Commissioner General:
(Sgd.) G. G. TOLMAN,
Immigrant Inspector.

GG. [24]

In the United States District Court in and for the District and Territory of Hawaii. In the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus. Alternative Writ of Habeas Corpus. Filed on return Aug. 9, 1923, at 9 o'clock and X minutes A. M. (Sgd.) Wm. L. Rosa, Clerk. Lightfoot & Lightfoot, Attorneys for Petitioner, McIntyre Building, Honolulu. [25]

In the United States District Court in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

ALTERNATIVE WRIT OF HABEAS CORPUS.

The United States of America to RICHARD L. HALSEY, United States Immigration Inspector in Charge at the Port of Honolulu, GREETING:

Upon reading the petition for writ of habeas corpus filed in the above-entitled court and cause by

Takeyo Koyama, and good cause appearing therefor, and it appearing to the Court that the circumstances of the case require that an alternative writ of habeas corpus shall be issued herein,—

You, Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu, are hereby ordered and directed to produce before this court on Wednesday, the 15th day of August, 1923, at the hour of 2 in the afternoon of said day, the body of Takeyo Koyama, wrongfully imprisoned by you, as it is said, then and there to do and receive what shall be considered by the Court in her behalf.

AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that the said petitioner, Takeyo Koyama, shall be immediately discharged from custody upon her giving an approved bond to the United States of America in the *panel* sum of $1000.00 conditioned for her appearance in court whenever thereunto [26] ordered by a Judge thereof.

Dated at Honolulu, this 7th day of August, 1923.

(S.) J. B. POINDEXTER,

Judge of the United States District Court in and for the District and Territory of Hawaii. [27]

In the United States District Court in and for the District and Territory of Hawaii. In the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus. Demurrer. Filed March 13, '24 at 2 o'clock and 10 minutes P. M. (Sgd.) Wm. L. Rosa, Clerk. Fred Patterson, Assistant

United States Attorney, Attorney for the Respondent [28]

In the United States District Court in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

DEMURRER.

Comes now the respondent in the above-entitled cause and demurs to the petition of petitioner on file herein and for ground of demurrer thereto specifies:

I.

That said petition does not state facts sufficient to warrant the Court to enter an order herein discharging the petitioner from the custody of the respondent.

II.

That it does not appear from said petition what are the facts from which the petitioner concludes that the hearing of the board of special inquiry was not a fair and impartial hearing.

III.

That it affirmatively appears from the said petition that the petitioner is not entitled to be released from the custody of the respondent herein.

WHEREFORE the respondent prays that this demurrer be sustained and the alternative writ of

habeas corpus heretofore issued in this cause be dismissed.

(Signed) FRED PATTERSON,
Assistant United States Attorney,
Attorney for Respondent. [29]

I, Fred Patterson, Assistant United States Attorney for the District of Hawaii, do hereby certify that in my opinion the foregoing demurrer is well taken in point of law.

(Signed) FRED PATTERSON. [30]

In the United States District Court for the Territory of Hawaii.

Habeas Corpus No. 188.

In the Matter of the Application of TAKEYO KOYAMA for a Writ of Habeas Corpus.

DECISION.

WILLIAM T. RAWLINS, Judge.

FRED PATTERSON, Attorney for Respondent.

LIGHTFOOT & LIGHTFOOT, Attorneys for Petitioner.

Filed Feb. 13, 1925. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Deputy Clerk. [31]

DECISION.

Petitioner herein Takeyo Koyama filed in this court, on the 7th day of August, 1923, a petition

for a writ of habeas corpus, and on the same date the Honorable J. B. Poindexter, Judge of this Court, issued an alternative writ of habeas corpus addressed to Richard L. Halsey, U. S. Immigration Inspector in charge at the Port of Honolulu. To the petition respondent filed a demurrer. The record discloses the following facts:

That petitioner is a citizen of the Empire of Japan, and first arrived in the United States on May 18, 1918, at the Port of Honolulu, and at that time and place was married to Matsuichi Koyama, a citizen of the United States; that she resided with him until September 1, 1920, when said Matsuichi Koyama departed from the Territory of Hawaii and took up his residence in Los Angeles State of California, and that he, from said date of departure has not returned to the Territory of Hawaii; that petitioner left the Port of Honolulu on the 26th day of June, 1922, for the Empire of Japan, taking with her her infant son; that prior to her departure she made an affidavit before a notary public in Honolulu setting forth, among other matters, the fact of her citizenship, the date of arrival in the Territory of Hawaii, her marriage to Matsuichi Koyama and his citizenship, and that she intended to depart "temporarily to Japan for her health."

Petitioner resided in Japan until June 6, 1923, and arrived at the Port of Honolulu on the 16th day of that month. Prior to her departure from Japan she presented herself at the United States Consu-

late in Yokohama, and before Paul E. Jenks, Vice-consul of the United States, swore to an affidavit setting forth that she was the identical person named in the affidavit made in Honolulu before her departure for Japan, and that it was her intention to return to Honolulu, Hawaii, to join her husband who was an American citizen, and intended to take passage on the SS. "Tenyo Maru," sailing from [32] Yokohama June 6, 1923.

Upon her arrival at the Port of Honolulu a Board of Special Inquiry convened and considered her case and denied her admission on the grounds that was an alien without a passport as contemplated by the regulations of the State Department, and therefore not entitled to land.

The grounds for the petition are:

1. That the hearing before the Board of Special Inquiry was not a fair hearing.

2. That as a matter of law the findings of the Board of Special Inquiry were illegal, for the reason that said Board failed to take into account the fact that petitioner is the wife of an American citizen and therefore has the right to enter the United States without a passport.

3. That the document verified before the United States Vice-Consul at Yokohama, Japan, is the equivalent of a passport, and gave petitioner the right to enter the United States.

The contention advanced on behalf of respondent before this Court is, that petitioner, being an alien and without a passport from her government, is not entitled to land by virtue of the Act of May 22,

1918 (Comp. Stats. 1918, Comp. Stats. Ann. Supp. 1919, Sec. 7628E et seq.), the Act of March 2, 1921 (41 St. 1205, 1217) and the Public Resolution of March 3, 1921.

As to the first claim of petitioner, a careful examination of the record of proceedings before the Board of Special Inquiry clearly discloses that the hearing was a fair one, and therefore the Court finds that the contention advanced on behalf of the petitioner is without merit.

That as to the second ground, under the laws of the United States, a Japanese woman does not become a citizen of the United States by virtue of her marriage to a citizen. Section 1994 Revised Statutes only confers citizenship upon a woman married to [33] a citizen of the United States "who might herself be lawfully naturalized." Nor does the marriage to a citizen of the United States prevent the deportation of an alien woman for a violation of the immigration laws.

Yeung How vs. North, 223 U. S. 705.

See, also, Whoo Choy vs. North, 183 Fed. 92, in which Certiorari was denied by the Supreme Court of the U. S.

The record discloses the petitioner in this case to be a citizen of the Empire of Japan, and therefore her marriage to a citizen of the United States did not confer citizenship upon her.

Low Wah Suey vs. Backus, 225 U. S. 460.

An Act approved May 22, 1918, entitled "An Act to prevent, at any time of war, departure from and

entry into the United States, contrary to public safety," provides:

> "When the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof. It shall, until otherwise ordered by the President or Congress, be unlawful—
>
> "(a) For any alien to depart from to enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

"An act making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1922," being Public Act No. 357, Sixty-Sixth Congress, approved March 2, 1921 (41 Stat. 1205, 1217), provides as follows:

> "Expenses, Passport Control Act.
>
> "For expenses of regulating entry into the United States in accordance with the provisions of the act approved May 22, 1918, and of this act, to be immediately available, $600,000, Provided, that the provisions of the act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés from [34] aliens seeking to come to the United

States, continue in force and effect until otherwise provided by law."

A joint resolution declaring that certain acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired, being Public Resolution No. 54, Sixty-Sixth Congress, approved March 3, 1921 (41 Stat. 1359), provides:

> "And any act of Congress, or any provision of any such act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding excepting, however, from operation and effect of this resolution certain acts not now in question."

The question presented by this petition is whether the repeal of the war-time act of May 22, 1918, by virtue of Public Resolution of March 3, 1921, is effective as to all of the provisions of that act, notwithstanding the act approved March 2, 1921, above set forth.

The effect of the act of March 2, 1921, was to extend the passport and visé provisions of the act of May 22, 1918, beyond the period set forth in that act, namely, when the United States is at war, and to that extent to repeal this time extension of the

passport visé provisions of that act. Text, context, and the legislative history of this proviso clearly support this construction.

60 Congressional Record, February 24, 1921, pages 4018 to 4022, inclusive.

See also Opinion of Attorney General to Secretary of State, March 30, 1921, 32 Opinions of the Attorney General, 493.

It is clear that these provisions were not, therefore, by their terms "in force only during the existence of a state of war," [35] and are therefore not repealed by the joint resolution of March 3, 1921.

Petitioner herein not having provided herself with a passport, and the affidavits, one made in Honolulu, and the other before the American Consul in Yokohama, Japan, not having the force of or taking the place of a passport as required by the statutes above quoted, cannot be admitted into the United States.

The demurrer for the foregoing reasons is therefore sustained and petitioner's writ of habeas corpus dismissed.

(Signed) WILLIAM T. RAWLINS,
Judge, U. S. District Court Territory of Hawaii.

[36]

In the United States District Court in and for the Territory of Hawaii. No. 188. In the Matter of the Application of Takeyo Koyama for a Writ of Habeas Corpus. Judgment. Filed Feb. 21, '25.

Wm. L. Rosa, Clerk. By (S) Wm. F. Thompson, Jr., Deputy Clerk. 11:50 A. M. Entered in J. D. Book, page 4437. Charles F. Parsons, United States Attorney, District of Hawaii. [37]

In the United States District Court in and for the Territory of Hawaii.

No. 188.

In the Matter of the Application of TAKEYO KOYAMA, for a Writ of Habeas Corpus.

JUDGMENT.

This cause having come regularly on to be heard before the above-entitled court at the April, 1923, term thereof, on the petition of petitioner, and an alternative writ of habeas corpus having issued in said cause, and a demurrer having been interposed by the respondent to said petition and said alternative writ; and the Court having duly examined and considered the same and having listened to the arguments of counsel for the respective parties, and after duly deliberating upon the matter, the Court finds that said demurrer is well taken and is therefore sustained; and it further finds that the alternative writ of habeas corpus heretofore issued herein should be dismissed; that the order to show cause by a writ of habeas corpus should not issue herein should be dismissed; and finds that the petitioner should be remanded to the respondent A. E.

Burnett, Inspector in Charge of Immigration at the Port of Honolulu, Territory of Hawaii.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the alternative writ of habeas corpus and said order to show cause heretofore issued herein be and the same are hereby discharged, and the petition is dismissed;

IT IS FURTHER ORDERED that the said petitioner Takeyo Koyama be and he is hereby remanded to the custody of the respondent A. E. Burnett, Inspector in charge of Immigration as aforesaid.

WITNESS the Honorable W. T. RAWLINS, Judge of the District Court of the United States, in and for the Territory of Hawaii, at Honolulu, T. H. this 21st day of February, 1925.

[Seal] (Signed) WM. L. ROSA,
Clerk of said Court. [38]

Minutes of the United States District Court,
Honolulu, Territory of Hawaii.

Saturday, August 25, 1923.

(Title of Court and Cause.)

(ORDER GRANTING RESPONDENT ADDITIONAL TIME TO FILE RETURN.)

Personally appeared Mr. J. Lightfoot, of the firm of Lightfoot & Lightfoot, counsel for the applicant above named and also appeared Mr. Fred Patterson,

Assistant United States Attorney. By agreement of counsel, the Court granted counsel for the respondent additional time within which to file return, October 25, 1923, being the date given.

J. B. POINDEXTER,
District Judge Presiding. [39]

Minutes of the United States District Court,
Honolulu, Territory of Hawaii.

Thursday, March 13, 1924.

(Title of Court and Cause.)

(ORDER OF CONTINUANCE.)

Personally appeared Mr. Fred Patterson, Assistant United States Attorney, counsel for the respondent herein, the applicant and counsel being absent. Mr. Patterson filed in open court a demurrer. The Court thereupon ordered that this cause be continued to March 18, 1924, for argument on said demurrer.

WILLIAM T. RAWLINS,
District Judge Presiding. [40]

Minutes of the United States District Court,
Honolulu, Territory of Hawaii.
Tuesday, March 18, 1924.

(Title of Court and Cause.)

(PROCEEDINGS AT ARGUMENT ON DEMURRER AND ORDER OF CONTINUANCE.)

On this day came Mr. J. Lightfoot, of the firm of Lightfoot & Lightfoot, counsel for the applicant above named, and also came Mr. Fred Patterson, Assistant United States District Attorney, counsel for the respondent herein, and this cause was called for hearing on the demurrer heretofore filed by counsel for the respondent. Argument was had by counsel but not concluded. By order of Court this case was continued to March 19, 1924, for further argument, at 2 o'clock P. M.

WILLIAM T. RAWLINS,
District Judge Presiding. [41]

Minutes of the United States District Court,
Honolulu, Territory of Hawaii.
Wednesday, March 19, 1924.

(Title of Court and Cause.)

(PROCEEDINGS AT FURTHER ARGUMENT ON DEMURRER AND ORDER TAKING CASE UNDER ADVISEMENT.)

On this day came Mr. J. Lightfoot, of the firm of Lightfoot & Lightfoot, counsel for the applicant

above named, and also came Mr. Fred Patterson, Assistant United States District Attorney, counsel for the respondent herein, and this cause was called for further argument on the demurrer filed herein. After argument by respective counsel, the case was submitted.

WILLIAM T. RAWLINS,
District Judge Presiding. [42]

Minutes of the United States District Court,
Honolulu, Territory of Hawaii.
Friday, February 13, 1925.

(Title of Court and Cause.)

(ORDER EXTENDING TIME TO TEN DAYS TO PROSECUTE APPEAL.)

The Court having heretofore filed a decision sustaining the demurrer to the petition herein, counsel for the petitioner gave notice of appeal. The Court thereupon ordered that the counsel for petitioner tioner be given 10 days' time to prosecute appeal.

WILLIAM T. RAWLINS,
District Judge Presiding. [43]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188. In the Matter of the Petition of TAKEYO KOYAMA, for a Writ of Habeas Corpus. Petition for Appeal and Admission to Bail Pending Appeal. Filed Mar. 2, 1925, 2 P. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the Within Petition for Appeal and Admission to Bail Pending Appeal is Hereby Admitted this 2nd Day of March, 1925. Charles F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, T. H., Attorneys for Takeyo Koyama. [44]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

PETITION FOR APPEAL AND ADMISSION TO BAIL PENDING APPEAL.

Now comes Takeyo Koyama and respectfully represents that on the 21st day of February, 1925, a judgment was entered by this court dismissing her petition for a writ of habeas corpus and remanding her to the custody of A. E. Burnett, Esquire, United States District Director of Immigration at the port of Honolulu, for deportation.

And your petitioner respectfully shows that in

said record, proceedings and judgment, in this cause, lately pending in said court, manifest errors have intervened to the prejudice and inquiry of your petitioner, all of which will appear more in detail in the assignment of errors which is filed with this petition.

WHEREFORE, your petitioner prays that an appeal may be allowed her from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said court.

Dated at Honolulu, this 2nd day of March, 1925.

TAKEYO KOYAMA,
Petitioner.

LIGHTFOOT & LIGHTFOOT,
J. LIGHTFOOT,
Her Attorneys. [145]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188. In the Matter of the Petition of Takeyo Koyama, for a Writ of Habeas Corpus. Assignment of Errors. Filed Mar. 2, 1925, 2 P. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the within assignment of errors is hereby admitted, this 2nd day of March, 1925. Charles

F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, Attorneys for Takeyo Koyama. [46]

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA, for a Writ of Habeas Corpus.

ASSIGNMENT OF ERRORS.

Now comes Takeyo Koyama, by her attorneys, Messrs. Lightfoot & Lightfoot, and in connection with her petition for an appeal says that in the record and proceedings and judgment aforesaid, and during the trial of the above-entitled cause in said District Court, error has intervened to her prejudice; and this appellant here assigns the following errors, to wit:

I.

The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned and in dismissing her petition for a writ of habeas corpus and remanding her into custody for deportation.

II.

The Court erred in holding and deciding that the proceedings before the Board of Special Inquiry clearly discloses that the hearing was a fair one.

III.

The Court erred in holding and deciding that the effect of the Act of March 2, 1921 was to extend the passport and visé provisions on the Act of May 22, 1918, beyond the period set forth in that Act, namely, when the United States is at war, and to that extent to repeal this time extension of the passport visé provisions of that Act. [47]

IV.

The Court erred in holding and deciding as follows:

> It is clear that these provisions (that is, the provisions of the Act of May 22, 1918) were not "in force only during the existence of a state of war and are therefore not repealed by the joint resolution of March 3, 1921."

V.

The Court erred in holding and deciding as follows:

> "The petitioner herein not having provided herself with a passport, and the affidavits, one made in Honolulu, and the other before the American Consul at Yokohama, Japan, not having the force of or taking the place of a passport as required by the statutes above quoted, cannot be admitted to the United States."

VI.

The Court erred in sustaining the demurrer filed in said cause.

VII.

The Court erred in entering judgment discharg-

ing the alternative writ of habeas corpus theretofore issued in said cause.

VIII.

The Court erred in entering judgment remanding petitioner to the custody of the respondent, A. E. Burnett, Inspector in Charge of Immigration.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that she, the said petitioner and appellant, be ordered discharged from custody.

Dated at Honolulu, this 2d day of March, 1925.

TAKEYO KOYAMA,
Petitioner.

By LIGHTFOOT & LIGHTFOOT,
J. LIGHTFOOT,
Her Attorneys. [48]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188. In the Matter of the Petition of Takeyo Koyama, for a Writ of Habeas Corpus. Order Allowing Appeal and Releasing Prisoner on Bail. Filed Mar. 2, 1925, 2 P. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the within order allowing appeal and releasing prisoner on bail is hereby admitted, this 2nd day of March, 1925. Charles F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–92–10 McIntyre Building, Honolulu, T. H., Attorneys for Takeyo Koyama. [49]

In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA, for a Writ of Habeas Corpus.

ORDER ALLOWING APPEAL AND RELEASING PRISONER ON BAIL.

On reading the petition of Takeyo Koyama for an appeal from the judgment entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, and upon consideration of the assignment of errors presented therewith,—

IT IS HEREBY ORDERED that the appeal, as prayed for, be, and the same is, hereby allowed.

And it appearing to the Court that a citation was duly served, as provided by law, it is ordered that petitioner be admitted to bail pending the final determination of this appeal in the sum of One Thousand Dollars ($1,000.00) the appeal to operate as a supersedeas.

Cost bond on appeal is hereby fixed at the sum of Five Hundred Dollars ($500.00).

Dated at Honolulu, this 2d day of March, 1925.

WILLIAM T. RAWLINS,

Judge, United States District Court, in and for the District and Territory of Hawaii. [50]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188.

In the Matter of the Petition of Takeyo Koyama, for a Writ of Habeas Corpus. Citation. Filed Mar. 2, 1925, 2 P. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the within citation is hereby admitted, this 2nd day of March, 1925. Charles F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, T. H., Attorneys for Takeyo Koyama. [51]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA, for a Writ of Habeas Corpus.

CITATION.

The United States of America,—ss.

The President of the United States, To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco within thirty days from the date of this writ pursuant to an appeal duly allowed by the District Court of the United States in and for the District and Territory of Hawaii and filed in the Clerk's office of said court on the 2d day of March, 1925, in a certain cause wherein Takeyo Koyama is appellant and you are appellee to show cause, if any, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be

corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM T. RAWLINS, Judge of the District Court of the United States, in and for the District and Territory of Hawaii, this 2d day of March, 1925.

WILLIAM T. RAWLINS,

Judge, United States District Court, in and for the District and Territory of Hawaii.

[Seal] Attest: WM. L. ROSA, Clerk. [52]

In the United States District Court in and for the District and Territory of Hawaii. No. 188. In the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus. Supersedeas Bail Bond. Filed Mar. 7, 1925, at 11 o'clock and 1 minutes A. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the Within Supersedeas Bail Bond is Hereby Admitted this 6th day of March, 1925. Charles F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, Attorneys for Takeyo Koyama. [53]

In the United States District Court in and for the District and Territory of Hawaii.

No. 188.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

SUPERSEDEAS BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Takeyo Koyama, as principal, and F. K. Makino and S. Uyeda, as sureties, are held and firmly bound unto the United States of America in the penal sum of One Thousand Dollars ($1,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Witness our hands and seals, this 6th day of March, A. D. 1925.

WHEREAS, heretofore and on, to wit, the 21st day of February, 1925, judgment was entered in the said court and cause dismissing the alternative writ of habeas corpus and remanding the said Takeyo Koyama to the custody of the Immigration officials, and

WHEREAS, an appeal has been duly allowed from said judgment to the United States Circuit Court of Appeals of the Ninth Circuit, and

WHEREAS on the 2d day of March, 1925, by an order duly made and entered in said court and cause by the Honorable William T. Rawlins, Judge

of said court, it was provided that [54] the said Takeyo Koyama should be admitted to bail in the sum of One Thousand Dollars ($1,000.00) pending the said appeal;

THEREFORE, and this obligation is such that if the said Takeyo Koyama shall appear and surrender herself in open court before the Judges of said court, and shall abide the further order of the court, in the event said judgment shall be affirmed, and not depart the court, then this obligation shall be null and void, otherwise to remain in full force and effect.

IN WITNESS, the said parties have hereto set their hands and seals, this 6th day of March, A. D. 1925.

TAKEYO KOYAMA, (Seal)
Principal.
F. K. MAKINO, (Seal)
S. UYEDA, (Seal)
Sureties.

Territory of Hawaii,
United States of America,—ss.

F. K. Makino and S. Uyeda, being first duly sworn, on oath, each for himself, deposes and says: That he is the surety on the foregoing bond; that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and has property situate within the Territory of Hawaii subject to execution and that he is worth in property within the Territory of Hawaii aforesaid, more than the amount of the penalty specified in said bond, over and above

all his debts and liabilities and property exempt from execution.

F. K. MAKINO.
S. UYEDA.

Subscribed and sworn to before me this 6th day of March, 1925.

[Seal] JIUNKI MAEDA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved:

WILLIAM T. RAWLINS,
Judge, United States District Court in and for the District and Territory of Hawaii.

Approved as to form:

CHARLES F. PARSONS,
U. S. Attorney, District of Hawaii. [55]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188. In the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus. Appeal Bond for Costs. Filed Mar. 7, 1925, at 11 o'clock and 1 minutes A. M. Wm. L. Rosa, Clerk. By Wm. F. Thompson, Jr., Deputy Clerk. Service of the within appeal bond for costs is hereby admitted this 6th day of March, 1925. Charles F. Parsons, United States Attorney. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, Attorneys for Takeyo Koyama. [56]

In the United States District Court in and for the District and Territory of Hawaii.

No. 188.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

APPEAL BOND FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS: That we, Takeyo Koyama, as principal and F. K. Makino and S. Uyeda, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselve, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of March, 1925.

WHEREAS, at the October, 1925, Term of the United States District Court in and for the District and Territory of Hawaii in a habeas corpus proceeding pending in said court, to wit, in the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus, Habeas Corpus No. 188, a judgment was rendered against the said Takeyo Koyama dismissing her petition for a writ of habeas and remanding her into the custody of Immigration officials, and the said Takeyo Koyama having obtained an appeal to the United States Circuit Court

of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid proceeding,— [57]

NOW, the condition of the above obligation is such that if the said Takeyo Koyama shall prosecute her appeal to effect and answer all damages and costs if she fails to make her plea good, then the above obligation to be void; else to remain in full force and effect.

TAKEYO KOYAMA, (Seal)
Principal.
F. K. MAKINO, (Seal)
S. UYEDA, (Seal)
Sureties.

United States of America,
Territory of Hawaii,—ss.

F. K. Makino and S. Uyeda, being first duly sworn, on oath, each for himself, deposes and says: That he is the surety on the foregoing bond; that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and has property situate within the Territory of Hawaii, subject to execution and that he is worth in property within the Territory of Hawaii aforesaid, more than the amount of the penalty specified in said bond, over and above all his debts and liabilities and property exempt from execution.

F. K. MAKINO.
S. UYEDA.

Subscribed and sworn to before me this 6th day of March, 1925.

[Seal] JIUNKI MAEDA,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved:

WILLIAM T. RAWLINS,

Judge, United States District Court, in and for the District and Territory of Hawaii.

Approved as to form:

CHARLES F. PARSONS,

U. S. Attorney, Dist. of Hawaii. [58]

In the District Court of the United States in and for the District and Territory of Hawaii. No. 188. In the Matter of the Application of Takeyo Koyama for a Writ of Habeas Corpus. Order Extending Time for Filing Record. Filed Apr. 30, 1925, at 2 o'clock and 30 minutes P. M. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [59]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

ORDER EXTENDING TIME TO AND INCLUDING MAY 31, 1925, FOR FILING RECORD.

Upon request of Wm. L. Rosa, Clerk of the United States District Court, and upon satisfactory showing that said request is reasonable—

IT IS HEREBY ORDERED that the time for the completion and filing of the record on appeal to the Circuit Court of Appeals of the Ninth Circuit in the above-entitled cause be, and the same is, hereby extended to and including the 31st day of May, A. D. 1925.

WILLIAM T. RAWLINS,
Judge, United States District Court.

Approved:

CHARLES F. PARSONS,
United States District Attorney. [60]

In the District Court of the United States in and for the District and Territory of Hawaii. 188. In the Matter of the Petition of Takeyo Koyama for a Writ of Habeas Corpus. Order Extending Time for Filing of Record. Filed Mar. 31/25, at 3 o'clock and 05 minutes P. M. Wm. L. Rosa, Clerk. By ————, Deputy Clerk.

Received a copy of the foregoing order extending time for filing record this 31st day of March, 1925. ————, Attorney for ————. Lightfoot & Lightfoot, 9–9a–10 McIntyre Building, Honolulu, Attorneys for Takeyo Koyama. [61]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Petition of TAKEYO KOYAMA for a Writ of Habeas Corpus.

ORDER EXTENDING TIME TO AND INCLUDING APRIL 30, 1925, FOR FILING RECORD.

Upon request of Wm. L. Rosa, Clerk of the United States District Court, and upon satisfactory showing that said request is reasonable—

IT IS HEREBY ORDERED that the time for the completion and filing of the record on appeal to the Circuit Court of Appeals of the Ninth Circuit in the above-entitled cause be, and the same is hereby extended to and including the 30th day of April, 1925.

WILLIAM T. RAWLINS,
Judge, U. S. District Court Territory of Hawaii.

Approved:

CHARLES F. PARSONS,
U. S. Attorney. [62]

In the United States District Court for the Territory of Hawaii.

No. 188.

In the Matter of the Application of TAKEYO KOYAMA for a Writ of Habeas Corpus.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 63, inclusive to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I am attaching hereto the original petition for allowance of appeal and supersedeas, assignment of errors, order allowing appeal and supersedeas, supersedeas bond, bond for costs, citation and two orders extending time to file record, and I also further certify that the cost of the foregoing transcript of record is $24.50 and that said amount has been paid to me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 19th day of May, A. D. 1925.

[Seal] WM. L. ROSA,
Clerk, United States District Court, Territory of Hawaii. [63]

[Endorsed]: No. 4637. United States Circuit Court of Appeals for the Ninth Circuit. Takeyo Koyama, Appellant, vs. A. E. Burnett, Immigration Inspector of the Port of Honolulu, Hawaii, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed July 14, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4637

United States
Circuit Court of Appeals
For the Ninth Circuit

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Inspector of the Port of Honolulu, Hawaii,

Appellee.

Brief on Behalf of Appellant

Upon Appeal from the United States District Court for the Territory of Hawaii

No. 4637

United States
Circuit Court of Appeals

For the Ninth Circuit

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Inspector of the Port of Honolulu, Hawaii,

Appellee.

Brief on Behalf of Appellant

Upon Appeal from the United States District Court for the Territory of Hawaii

INDEX TO BRIEF

No. 4637

United States Circuit Court of Appeals for the Ninth Circuit.

TAKEYO KOYAMA,

Appellant,

vs.

A. E. BURNETT, Immigration Ispector of the Port of Honolulu, Hawaii,

Appellee.

BRIEF ON BEHALF OF APPELLANT.

I

STATEMENT OF THE CASE

This is an an appeal from a judgment entered in the United States District Court in and for the District and Territory of Hawaii on February 21, 1925, in a habeas corpus case filed in said Court where Takeyo Koyama, appellant here, was petitioner. (*Record, pages* 40 *and* 41).

THE PETITION. The petition for writ of habeas corpus, which was addressed to the Honorable J. B. Poindexter, then Judge of the District Court of the United States in and for the District and Territory of Hawaii, alleges that petitioner was born in Japan and is a subject of the Emperor of Japan; that she first arrived at the port of Honolulu on May 18, 1918

and upon her arrival was married, according to the laws of the Territory, to Matsuichi Koyama, who was born in the Territory on August 18, 1892 and holds a Certificate of Hawaiian Birth issued by the Secretary of Hawaii; that the petitioner is a musician able to make a living by her musical knowlelge; that on June 26, 1922, petitioner went to Japan for the purpose of having the child of petitioner and her said husband placed in the care of petitioner's aunt; that petitioner intended to return to Hawaii from Japan, remain a short time and then proceed to Los Angeles to join her husband who is engaged in business in that city; that before leaving here for Japan, petitioner signed and verified, under oath, before a Notary Public, an affidavit alleging the marriage as aforesaid, and the American citizenship of her husband; that said affidavit was accompanied by the certificate of the Attorney General of the Territory of Hawaii to the effect that the Notary Public taking the oath was duly authorized to so do; that before leaving Japan and returning to the Territory of Hawaii, petitioner visited the Consulate of the United States at the port of Yokohama, where she took and subscribed an oath before the American Vice Consul to the effect that she was the same person mentioned in the affidavit above referred to and that it was the intention of petitioner to depart from the port of Yokohama, Japan, on board the Tenyo Maru sailing June 6, 1923, for the

purpose of returning to Honolulu to join her husband who is an American citizen. To the affidavit taken before the American Consul, there is attached the photograph of petitioner; that upon presentation of the affidavit made in Honolulu before departure and the signing of the affidavit made before the American Vice Consul, petitioner was informed by the American Vice Consul at the port of Yokohama that in view of the fact that petitioner is the wife of an American citizen no passport would be required and thereupon petitioner left said port of Yokohama on board the steamship Tenyo Maru on the 6th of June, 1923, bound for the port of Honolulu, bearing the affidavits aforesaid and without a passport issued by the government of Japan.

That upon arriving at the port of Honolulu, on or about the 16th day of June, 1923, one immigrant inspector, Jackson L. Milligen, examined petitioner, and acting alone, held petitioner for examination before a Board of Special Inquiry of the Immigration Service at the port of Honolulu; that petitioner was examined before said Board of Special Inquiry on the 16th and 18th days of June, 1923, and at the conclusion of the examination, petitioner was informed by the Chairman of the Board that she was denied a landing in the United States and was ordered deported to Japan, she being notified of her right to appeal to the Secretary of Labor.

That petitioner signed an appeal to the Secretary of Labor, not being represented by counsel, and petitioner upon information and belief alleges that her appeal was forwarded to the Secretary of Labor by the Immigration Inspector in Charge, said appeal being accompanied by a statement of the case made by the Inspector in Charge. Petitioner upon information and belief alleges that the Acting Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry.

That petitioner is imprisoned by Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu at the United States Immigration Station, Honolulu, under the holding of said Board of Special Inquiry, affirmed by the Acting Secretary of Labor and that it is the intention of the Inspector in Charge to deport petitioner to Japan by the first available steamer for that purpose.

Petitioner alleges that the imprisonment is illegal for the following reasons:

First: She was held for examination before the Board of Special Inquiry by one inspector, contrary to the provisions of Subdivision 1, Rule 3 of the Immigration Rules of May 1, 1917;

Second: That the hearing before the Board of Special Inquiry was not a fair and impartial hearing but was an unfair hearing and constituted a mere semblance of a hearing;

Third: That as a matter of law, the findings of the Board of Special Inquiry were illegal for the reason that they failed to take into account the fact that petitioner was the wife of an American citizen and had the right to enter the United States without a passport;

Fourth: That the document verified before the Vice Consul at Yokohama was the equivalent of a passport and gave the right to petitioner to enter the United States. The prayer is for a writ of habeas corpus directing the Immigration Inspector in Charge to produce the body of petitioner before the Court to the end that the said imprisonment may be inquired into and that upon a hearing the same may be made perpetual and the petitioner discharged from custody thereunder.

The petition was verified by the petitioner on August 6, 1923. (*Record, pages* 5 *to* 12.)

EXHIBITS ATTACHED TO PETITION.

There is attached to the petition the following exhibits:

Exhibit "A." Affidavit of Takeyo Koyama dated June 21, 1922, taken before a Notary Public, stating that she is a subject of the Japanese Empire and first arrived in the Hawaiian Islands on May 18, 1918; that she was married to Matsuichi Koyama; that her husband is an American citizen. (*Record, pages* 12 *and* 13.)

Exhibit "B." Certificate of the Attorney General

as to the authority of the Notary Public taking the foregoing affidavit.

Exhibit "C." Copy of Affidavit taken before Paul E. Jenks, Vice Consul of the United States of America at the port of Yokohama, declaring that affiant is the same person mentioned in the affidavit, Exhibit "A," and that it is her intention to return to Honolulu, as aforesaid. (*Record, pages* 15 *and* 16.)

Exhibit "D." Copy of testimony taken before the Board of Special Inquiry at the port of Honolulu on June 16, 1923, together with proceedings had at the conclusion of said hearing. (*Record, pages* 16 *to* 26.)

Exhibit "E." Appeal to the Secretary of Labor, without the services of an attorney, from the decision of the Board of Special Inquiry. (*Record, page* 26.)

Exhibit "F." Letter of Inspector in Charge dated the 20th of June, 1923, transmitting the appeal and expressing the opinion of the Inspector in Charge concerning certain features of the findings of the Board of Special Inquiry. (*Record, pages* 26 *to* 29.)

Exhibit "G." Letter of G. G. Tolman, Immigrant Inspector for the Commissioner General notifying the Inspector in Charge at the port of Honolulu of the receipt of his letter of June 20 and the affirmations of the excluding decision. (*Record, pages* 29 *and* 30.)

THE ALTERNATIVE WRIT OF HABEAS CORPUS. On August 7, 1923, an alterna-

tive writ of habeas corpus was issued by the Honorable J. B. Poindexter, then Judge of said District Court, ordering the Inspector in Charge to produce the body of petitioner before the Court on August 15, 1923, and further ordering that petitioner be discharged from custody upon her giving an approved bond in the penal sum of One Thousand Dollars ($1,000.00) for her appearance in court whenever thereunto ordered by a Judge thereof. (*Record, pages* 30 *to* 32.)

DEMURRER TO PETITION. Fred Patterson, Assistant United States Attorney, attorney for respondent, filed a demurrer to the petition above referred to, alleging that said petition does not states facts suffcient to warrant the Court to enter an order discharging the petitioner from custody; that it does not appear from the petition what are the facts upon which petitioner concludes that the hearing before the Board of Special Inquiry was not a fair and impartial hearing and that it affirmatively appears that the petitioner is not entitled to be released from custody and praying that the demurrer be sustained and the alternative writ of habeas corpus, heretofore issued, be dismissed. (*Record, pages* 32 *and* 33.)

DECISION. A decision was filed by the Honorable W. T. Rawlins, Judge of said District Court, on February 13, 1925, the decision holding, first, that the hearing before the Board of Special Inquiry was a fair one; second, that petitioner did not become an Ameri-

can citizen by reason of her marriage to an American citizen; and third, that petitioner not having provided herself with a passport and the affidavits made in Honolulu and at the American Consulate in Japan, not having the force or taking the place of a passport, she cannot be admitted to the United States. The demurrer was sustained and petitioner's writ of habeas corpus dismissed. (*Record, pages* 33 *to* 40.)

JUDGMENT. On February 21, 1925, judgment was entered in said cause dismissing the alternative writ of habeas corpus and remanding petitioner to the custody of A. E. Burnett, Inspector in Charge of Immigration at the port of Honolulu. (*Record, pages* 40 *and* 41.)

APPEAL. On March 2, 1925, petitioner filed her petition for appeal and admission to bail pending appeal, (*Record, pages* 45 *and* 46,) accompanied by an assignment of errors, (*Record, pages* 47 *to* 49), order allowing appeal and releasing prisoner on bail in the sum of One Thousand Dollars ($1,000.00), (Record, page 50), citation, (*Record, pages* 51 *and* 52, a supersedeas bail bond was given. (*Record, pages* 53 *and* 54), an appeal bond for costs, (*Record, pages* 56 *and* 57.)

II

SPECIFICATION OF THE ERRORS RELIED UPON.

The appellant relies upon the following errors:

First: The Court erred in holding and deciding that the proceedings before the Board of Special Inquiry clearly disclose that the hearing was a fair one. (*Assignment No.* 2).

Second: The Court erred in holding and deciding that the effect of the Act of March 2, 1921 was to extend the passport and vise provisions of the Act of May 22, 1918, beyond the period set forth in that Act. (*Assignment No.* 3).

Third: The Court erred in holding and deciding that the provisions of the Act of May 22, 1918, were not "in force only during the existence of a state of war and are therefore not repealed by the joint resolution of March 3, 1921." (*Assignment No.* 4).

Fourth: The Court erred in holding and deciding as follows:

"The petitioner herein not having provided herself with a passport; and the affidavits, one made in Honolulu and the other before the American Consul of Yokohama, Japan, not having the force or taking the place of a passport, as required by the statutes above quoted, cannot be admitted to the United States." (*Assignment No.* 5).

Fifth: The Court erred in sustaining the demurrer filed in said Case. (*Assignment No.* 6).

Sixth: The Court erred in not holding that petitioner and appellant is wrongfully held and illegally imprisoned and dismissing her petition for writ of habeas corpus and remanding her into custody for deportation. (*Assignment No.* 1).

Seventh: The Court erred in entering judgment discharging the alternative writ of habeas corpus and remanding petitioner to the custody of the Inspector in Charge. (*Assignment Nos.* 7 *and* 8).

III

ARGUMENT.

First: (a). ***IT WAS UNFAIR THAT PETITIONER SHOULD BE HELD FOR EXAMINATION BEFORE THE BOARD OF SPECIAL INQUIRY BY ONE INSPECTOR, TOWIT: BY INSPECTOR JACKSON L. MILLIGEN.***

Section 16 of the Immigration Laws of February 5, 1907, provides, inter alia, as follows:

"All aliens arriving at ports of the United States shall be examined by at least two immigration inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe."

Rule 3 of the Immigration Rules of May 1, 1917, provides as follows:

"Subdivision 1. Double Inspection. At each of the ports of New York * * * Honolulu, two immigrant inspectors shall pass upon the case of each arriving alien. The two inspectors to serve together for this purpose shall be designated from day to day by the immigration officials in charge at such port. The challenging of decisions of one inspector by another shall be continued."

The petition shows that when the petitioner arrived at the port of Honolulu on her return to Hawaii, she was held for examination before one inspector. This fact has never been denied and is admitted by the demurrer. It may well be that if two inspectors had examined the alien in the first place, she would have been immediately allowed to land. This right of double examination is a substantial one and any examination before a Board of Special Inquiry, upon the action of one inspector, is in contravention of the rights of the alien.

(b) *THE EXAMINATION OF THE PETITIONER BY THE MEMBERS OF THE BOARD OF SPECIAL INQUIRY WAS UNFAIR.*

We respectfully call the Court's attention to the following parts of this examination:

The alien having testified that her husband went to Los Angeles on September 1, 1920, was asked this question. "How is it you should separate for such a long time and you go to Japan and he to the States?"

A. "I postponed going to the Mainland because we would like to send our child to Japan and then I would like to go and join my husband."

Q. "Why didn't he take you and the child to the Mainland with him?"

A. "My aunt in Japan said to us 'I will take care of your child.'" * * *

Q. "Why is it that you let your aunt take care of your child? He is only three years old and was very young when you took him to Japan?"

A. "I left my child with my aunt and I am going to the Mainland to get work."

Q. "You do not think very much of your child, do you?"

A. "No." (*Record, pages* 18 *and* 19.)

This testimony evidently had great weight in the mind of the chairman of the Board (Inspector Farmer) for he says (*Transcript, page* 23), "she is not the kind of woman whom I would consider desirable as a resident of this country. * * * but a woman who states that she does not care for her child and takes him to Japan and gives him in charge of an aunt is certainly not of the highest type of a woman though that is not a fact which would exclude her from admission." (*Record, pages* 23 *and* 24).

This testimony is explained by the Inspector in Charge, Mr. Halsey, in his letter to the Secretary of Labor, as follows:

"After the answer that she had left her child with her aunt she was asked, 'You do not think very much of your child, do you?' she answered 'No.'

The Inspector in the memorandum infers from this answer that she does not care for her child and is a woman who has no natural feeling. As I speak the Japanese language and understanding how a question like this might be put by an interpreter with a different understanding from the import that was intended to be conveyed by the Inspector and that the language would be very idiomatic, I asked the Interpreter what expression he used. He stated that he asked her if she was 'suspended much in her mind, about the child,' which we would freely translate whether she was worried or uneasy about the child and she replied, 'No'—she states that by her answer she meant she was not worried because in many ways her aunt knows how to take care of the child better than she would herself. (22)

The same difficulty in translating expressions in regard to thinking is seen in other languages—you may recall, that, in King James version of the Bible there is the translation—'Take no thought for the morrow' the translation of the Revised Version is 'Be not anxious,' which is beyond question the proper translation. However, this matter

does not impress me as being material as the decision is based on the fact that she is an alien without a passport. The appeal is submitted for such action as may commend itself to you in view of the showing in relation thereto."

The alien was interrogated as to her occupation.

Q. "What has been your occupation?"

A. "Nothing in Japan. I was a waitress at the Kikizuki Tea House, Vineyard Street, this city."

Q. "How long were you a waitress there?"

A. "Six months." (*Record, page* 17).

That the alien had made an honest living as a waitress seems to have prejudiced the mind of the chairman of the Board of Special Inquiry, and for aught it appears to the contrary, the minds of the members of the Board, for the chairman says "she is not the kind of woman whom I would consider desirable as a resident of this country. The occupation in which she has been engaged is one in which the persons engaged in it are often of questionable character, though not necessarily so." (*Record, page* 23).

Our domestic servants in Hawaii are generally of the Japanese race. As a rule, they are law abiding, self respecting, honest and intelligent servants. There is nothing in the fact of being engaged in domestic service which tends to throw discredit upon the servant.

The chairman of the Board of Special Inquiry also adverts to the fact that the alien "has lived for about

three years separate from her husband, although only married to him five years and that arouses suspicion, but like the other facts, does not furnish facts that she is excludable." (*Record, page* 24).

It seems from the evidence that the husband of the alien, when in Honolulu, carried on the business of a florist. That in 1920, he went to Los Angeles for the purpose of conducting the business there. (*Record, page* 21).

If the husband and wife agreed that the aunt in Japan knew better how to bring up their child, than they did themselves, that is no concern of the immigration officials. There is no law excluding aliens because their ideas of social expediency as to members of their own family do not coincide with those of the officials of the Immigration Department.

Again, Mr. Farmer says "Then why did she not go to California instead of to Hawaii if she intends to join her husband? That has not been satisfactorialy explained." Nor was an explanation, satisfactory or otherwise, necessary under the circumstances. The alien relates the facts of the case and we respectfully submit that there is nothing in those facts reflecting or tending to reflect any discredit upon the alien. It will be noted that the Board of Special Inquiry in excluding the alien expressly refused to recommend a waiver of the passport and vise regulations in this case. (*Record, page* 25). This refusal shows that the members of the

Board of Special Inquiry, for some occult reason which does not appear in the record, had formed a prejudice against the alien; which prejudice, undoubtedly, influenced the members of the Board in arriving at a decision, particularly a decision not to recommend a waiver.

We respectfully submit that the hearing was an unfair one.

Second and Third: ***THE COURT ERRED IN HOLDING AND DECIDING THAT THE EFFECT OF THE ACT OF MARCH*** 2,1921, ***WAS TO EXTEND THE PASSPORT AND VISE PROVISIONS OF THE ACT OF MAY*** 22, 1918, ***BEYOND THE PERIOD SET FORTH IN THAT ACT.***

THE COURT ERRED IN HOLDING AND DECIDING THAT THE PROVISIONS OF THE ACT OF MAY 22, 1918, ***WERE NOT "IN FORCE ONLY DURING THE EXISTENCE OF A STATE OF WAR AND ARE THEREFORE NOT REPEALED BY THE JOINT RESOLUTION OF MARCH*** 3, 1921."

The Act of May 22, 1918, (40 *Statutes at Large* 559, 2 *U. S. Comp Stat.* 1916, *Supplement of* 1919, *page* 1495), provides as follows:

"DEPARTURE FROM OR ENTRY INTO UNITED STATES DURING WAR; ALIENS.

That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

In pursuance of the power thus conferred upon the President, a proclamation was issued on August 8, 1918, containing the following provisions:

". No citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

"2. No alien shall receive permission to depart from or enter the United States unless it shall

affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States."

(40 *Statutes at Large* 559, 2 *U. S. Comp. Stat. Supplement of* 1919,*page* 1496.)

The Act of March 2, 1921, (41 *Statutes at Large* 1217) being the Diplomatic and Consular Appropriation Act, after appropriating the sum of Six Thousand Dollars for the expenses of regulating entry into the United States under the Act of May 22, 1918, provides as follows:

"Provided that the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and vises from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law."

On the day following the approval of the Diplomatic and Consular Appropriation Act, towit, on March 3, 1921, a Joint Resolution was passed (41 *Statutes at Large* 1359), providing in part as follows:

"That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States,

in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of such Act, that by its terms is in force only during the existence of a stare of war or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding."

The foregoing, we believe, represents the condition of the law at the time when the appellant left Yokohama on her return to Hawaii on June 6, 1923 aboard the steamship "Tenyo Maru."

The foregoing statutory provisions are referred to and discussed in an opinion of the Attorney General (H. M. Daugherty) to the Secretary of State (32 *Opinions of Attorney General* 493) in which opinion

the Attorney General concludes that in view of the recent enactment of the Act of March 2, 1921, the Joint Resolution of March 3, 1921, does not have the effect of repealing the provisions of the Act of May 22, 1918, and of the regulations issued pursuant thereto which relate to requiring passports and vises from aliens seeking to come to the United States.

It is difficult to follow the reasoning of the Attorney General when he arrived at this conclusion. It is true that as stated by the Attorney General "effect must be given to all legislative provisions as far as may be and that the legislature is presumed to be fully advised of the exact state of prior legislation in enacting later." But, there is no rule of law, with which we are acquainted, requiring a certain lapse of time before a prior statute can be repealed. We respectfully submit that the language of the Joint Resolution of March 3, 1921, is clear and unambiguous, and that so far as the present case is concerned it had the effect of repealing the statute of May 22, 1918.

The foregoing statutory provisions were considered by this Court in the case of *Sichofsky vs. U. S.*, 277 *Fed.* 762. This case was decided on January 9, 1922, more than nine months after the opinion of the Attorney General, above referred to, had been written. This decision bears no reference to the opinion of the Attorney General and we, therefore, feel justified in believing either that the opinion was not called to the attention of

the court or that the court differed from the Attorney General in the conclusions arrived at.

The Sichofsky case is not very helpful in the case at bar for the reason that Sichofsky had plead guilty to an offense under the statute of May 22, 1918, committed in 1920 and that, therefore, his case came within the saving clause contained in the Joint Resolution of March 3, 1921, providing that no exemption from prosecution for violations of the act committed prior to March 3, 1921, should be a defense and it was for this reason that the judgment of the lower court was affirmed.

We respectfully submit that as far as the present case is concerned, the Act of May 22, 1918, is repealed by the Joint Resolution of March 3, 1921.

Fourth: ***THE COURT ERRED IN HOLDING AND DECIDING THAT THE PETITIONER, NOT HAVING PROVIDED HERSELF WITH A PASSPORT AND THE AFFIDAVITS NOT HAVING THE FORCE OR TAKING THE PLACE OF A PASSPORT AS REQUIRED BY THE STATUTES ABOVE QUOTED, CANNOT BE ADMITTED TO THE UNITED STATES.***

We are unable to find any statute requiring that the wife of an American citizen shall be provided with a passport before being allowed to reenter the United States after a temporary absence abroad.

Section 2 of the Act of May 22, 1918, (40 Statutes at Large, 559), provides that after the proclamation referred to in said Act has been made and published, it shall be unlawful for any *citizen of the United States* to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. Section 1 of the Act provides that after the proclamation therein referred to, it shall, unless otherwise ordered by the President or Congress be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations and orders and subject to such limitations and exceptions as the President shall prescribe, and Section 2 of the President's proclamation of August 8, 1918, provides that "no alien shall receive permission to depart from or enter the United States unless it shall affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States." (2 *U. S. Comp. Stat.* 1916, 1919 *Suppl.* 1496.)

The Act of June 14, 1902 (32 *Statutes at Large* 386, 7 *U. S. Comp. Stat.* 1916, 8137), provides that "no passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." The appellant did not by reason of her marriage become a citizen of the United States or owe allegiance thereto. It has

never been contended that she did and the special finding of the trial judge that she was not a citizen by reason of her marriage (*Record, page* 36) was unnecessary.

The Act of May 22, 1918, and the proclamation issued thereunder, did not require that an alien should have a passport before being permitted to reenter the United States.

It certainly appeared, in the examination of the alien before the Board of Special Inquiry, that there was reasonable necessity for the alien to enter the United States for the purpose of rejoining her husband and it certainly appeared that the reentry of appellant was not prejudicial to the interests of the United States.

The section provides that no alien shall receive permission to enter the United States unless, etc., but it is silent as to the person from whom the permission is to be obtained.

It will be remembered that the alien, prior to her departure from Hawaii, signed an affidavit as to her identity and upon this affidavit she was allowed to depart (*Record, pages* 6 *and* 7). In preparation for her return to Hawaii, she presented herself at the Consulate of the United States at the port of Yokohama and subscribed an oath before the Vice Consul, her affidavit being accompanied by her photograph, and thereupon she was informed by the Vice Consul, that in view of the fact that she was the wife of an American citizen,

no passport would be required. (*Record, pages* 7 *and* 8).

The latter affidavit was subscribed and sworn to before the Vice Consul, was ensealed with the Consulate seal and the fee of Two Dollars collected. (*Record, pages* 15 *and* 16). Having taken these precautions and received the advice of the Vice Consul, likewise his permission to depart for Hawaii (for otherwise she would have been unable to obtain passage on the steamer), she had a perfect right to believe and did believe that she, as the wife of an American citizen, had received permission from the proper authorities to reenter the United States.

We respectfully submit, therefore, that the court erred in holding and deciding that appellant should be excluded from the United States because she did not have a passport.

Fifth: ***THE COURT ERRED IN SUSTAINING THE DEMURRER FILED IN SAID CAUSE.***

The respondent, after the issuance of the alternative writ of habeas corpus, filed a demurrer to the petition for writ of habeas corpus alleging that the petition does not state facts sufffficient to entitle the petitioner to the relief prayed for therein. (*Record, pages* 32 *and* 33).

This demurrer was sustained. The alternative writ of habeas corpus dismissed. (*Record, page* 39).

We submit that the order sustaining the demurrer was erroneous for the following reasons:

(a) The United States is estopped by the act of its agent from demanding the exclusion of petitioner. Section 7 of the petition (*Record, page* 8), is as follows:

> "That upon the presentation of the affidavit Exhibit "A" and the signing of the affidavit Exhibit "C," your petitioner was informed by the Vice Consul of the United States at the port of Yokohama, that in view of the fact that your petitioner is the wife of an American citizen, no passport would be required and accordingly petitioner left the port of Yokohama on board the steamship "Tenyo Maru" on or about the 6th day of June, 1923, bound for the port of Honolulu, bearing the affidavits aforesaid and without the passport issued by the Government of Japan."

From Exhibit "C," it appears that Mr. Paul E. Jenks, Vice Consul of the United States of America at Yokohama, Japan, vised the affidavit and collected the fee of Two Dollars, ensealing the affidavit with the Consular seal, and the appellant, feeling that she had done everything required to be done, secured her ticket and travelled to Honolulu.

We submit that even though the Court should hold that the Act of May 22, 1918, was not repealed, as far as this case is concerned, by the Joint Resolution of March 3, 1921, the Court would be justified in consid-

ering the acts of the American Vice Consul as amounting to an estoppel on the part of the Government. In the case of *U. S. vs. Moy Non,* 249 *Fed.* 772, the Court held that:

> "Where a Chinese person, before returning to China for a visit, presented himself to the Bureau of Immigration for preinvestigation as to his status as a merchant, and the Bureau found that he had for the required time been engaged as a merchant and gave him a certificate, the government is, after his return from China, estopped from questioning his status as a merchant, where there was no competent proof of fraud on his part in obtaining reentry into the United States."

(b) The appellant does not come within any of the classes excluded under the Immigration Laws of the United States. The Immigration Laws of the United States provide for the exclusion of certain classes of aliens seeking to enter the United States. These classes are defined in Sections 3, 18 and 23 of the Act of 1917 as amended in 1918 and 1920, and said Act nowhere provides that the wife of an American citizen shall be excluded merely because she does not have a passport.

There is likewise no provision in the Rules of May 1, 1917, adopted by the Department of Labor, Bureau of Immigration, providing for such exclusion, and while the various Acts relating to passports provide punish-

ment for infraction of the law, they do not provide for exclusion. These Acts are Act of 1866 (14 *Statutes at Large,* 54), Act of June 14, 1902, (32 *Statutes at Large* 386), Act of June 15, 1917, (40 *Statutes at Large* 227), Act of May 22, 1918, (40 *Statutes at Large* 559), Act of July 2, 1921, (43 *Statutes at Large* 147), and Act of November 10, 1919, (41 *Statutes at Large* 353).

(c) The wife of an American citizen is entitled to land in the United States by reason of the citizenship of the husband. (*Hosaye Sakaguchi vs. White,* 277 *Fed.* 913).

This was a case decided in this Court where it was held that the wife (a Japanese) was entitled to land in the United States by reason of the residence of her husband therein even though the husband did not desire to receive her. (See also *Ex parte Shue Hong,* 286 *Fed.* 38; *Tsoi Sun vs. U. S.,* 116 *Fed.* 920-923; *U. S. vs. Gue Lim,* 176 *U. S.* 459).

It is not the policy of the United States to prevent a citizen or person lawfully residing in the United States from having the society of his wife and children. (*Quan Hing Sun, et al., vs. White,* 254 *Fed.* 402; *Hosaye Sakaguchi vs. White,* 277 *Fed.* 913; *Ex parte Chan Shee,* 236 *Fed.* 579; *U. S. Lee Chee,* 224 *Fed.* 447; *U. S. on the Relation of Shuey Quen vs. Pearce,* 285 *Fed.* 663; *Ex parte Shue Hong,* 286 *Fed.* 381;

Tsoi Sim vs. U. S., 116 *Fed.* 920; *U. S. vs. Gue Lim*, 176 *U. S.* 459).

In conclusion, we respectfully submit that the case of *Church of the Holy Trinity vs. U. S.*, 143 *U. S.* 457, applies in the case at bar. In that case, as pointed out by the Supreme Court, a strict construction of the Statute would result in the exclusion of the minister who sought to land under a contract with the Trustees of Holy Trinity Church, but the Supreme Court held that the spirit of the law should be consulted rather than the strict letter thereof.

We respectfully submit that the appellant did everything that she could; took every precaution, and that it would be unjust and not within either the letter or the spirit of the law to exclude her.

We submit that the judgment should be reversed.

Dated at Honolulu, this 1st day of October, A.D. 1925.

Respectfully submitted,
LIGHTFOOT & LIGHTFOOT,
By J. LIGHTFOOT
Attorneys for Takeyo Koyama,
appellant.

No. 4639

13

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation,

Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4639

United States
Circuit Court of Appeals
For the Ninth Circuit.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation,

Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index.

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

RANDALL & DANSKIN, Paulsen Building, Spokane, Washington,

GRAVES, KIZER & GRAVES, Old National Bank Bldg., Spokane, Washington.

Attorneys for Plaintiff and Defendant in Error.

WILLIAMS & CORNELIUS, Paulsen Building, Spokane, Washington,

Attorneys for Defendant and Plaintiff in Error.

In the Superior Court of the State of Washington, for Spokane County.

SPOKANE INTERSTATE FAIR,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

COMPLAINT.

For cause of action, plaintiff alleges:

1. Plaintiff is a corporation organized under the laws of the State of Washington and has paid its annual license fee last due. Defendant is a foreign corporation doing business in this state.

2. During the period hereinafter referred to, plaintiff was conducting a fair and exposition at the fair-grounds in the City and County of Spokane, State of Washington. It maintained an office in a building on the fair-grounds in which there was a vault, inside of which was a safe. In this safe, large sums of money were kept by plaintiff during the continuance of the fair and exposition.

3. Upon, to wit, August 31, 1924, defendant entered into a written contract with plaintiff whereby defendant agreed to indemnify plaintiff for all loss by burglary, not exceeding twenty-five thousand ($25,000) dollars, occasioned by the abstraction of money and securities from the interior of the safe or vault referred to in the second paragraph hereof by any person or persons making felonious entry into such safe or vault by actual force and violence, [1*] of which force and violence there should be visible marks made upon such safe or vault by tools, explosives, chemicals or electricity. The contract further provided that, in the event of any loss or damage, upon it coming to the knowledge of plaintiff, immediate notice thereof should be given by telegraph to the defendant at its Home Office in Baltimore, Maryland, or to a duly authorized agent of the defendant, and that notice should also be immediately given of such loss to the public police, or other peace authorities having jurisdiction. Affirmative proof of loss or damage, under oath, on forms provided by the defendant were required to be furnished to the defendant at its

*Page-number appearing at foot of page of original certified Transcript of Record.

Home Office in Baltimore, Maryland, within sixty days from the date of the discovery of such loss or damage. Such contract was effective from 12 o'clock noon on August 31, 1924, to and inclusive of 12 o'clock noon on September 10, 1924.

4. During the night of September 4, 1924, or the early morning hours of September 5, 1924, burglars effected a felonious entry into the office, vault and safe heretofore referred to and abstracted from the interior of such safe fourteen thousand nine hundred seventy-four and 35/100 ($14,974.35) dollars in money belonging to plaintiff and kept therein. Such entry was effected into the vault and safe by actual force and violence in that tools were used for cutting and removing bolts on the vault door and for drilling into the safe door, thus enabling the burglars to gain access to the interior of the safe and abstract the money contained therein. There were visible marks of the tools so used upon both the safe and vault doors.

5. Immediately upon discovery of the felonious abstraction of the money aforesaid, plaintiff gave notice to the duly authorized agents of the defendant in Spokane and also to the police [2] and peace authorities of the City and County of Spokane. Thereafter, within sixty days after the discovery of such loss, plaintiff made affirmative proof thereof, under oath, on forms provided by the defendant to the defendant at its Home Office in Baltimore, Maryland, such proof of loss being filled out as required by the contract and in accordance with the proof of loss furnished to plaintiff by defendant.

Plaintiff has also made demand upon defendant for the payment of the amount of the loss sustained as aforesaid, and defendant has refused payment thereof, and has denied that it is liable for the payment of the amount of such loss, or of any part thereof.

WHEREFORE, plaintiff demands judgment against defendant for the sum of fourteen thousand nine hundred seventy-four and 35/100 ($14,974.35) dollars and its costs herein expended.

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff. [3]

State of Washington,
County of Spokane,—ss.

Thomas S. Griffith, being duly sworn, states: That he is an officer of the within named plaintiff Spokane Interstate Fair, to wit, its president, and makes this verification for and on its behalf; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

THOMAS S. GRIFFITH.

Subscribed and sworn to before me this 1st day of December, 1924.

B. H. KIZER,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 28, 1925. Alan G. Paine, Clerk. Eva M. Hardin, Deputy.

This Instrument Served upon the Insurance Commissioner of the State of Washington, Dec. 4, 1924, at 1:30 o'clock P. M.

H. O. FISHBACK,
Insurance Commissioner.
By H. [4]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff.

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

ANSWER.

Comes now the defendant, and for answer to the complaint herein:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. That this defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 2 of the complaint and denies the same, except that defendant admits that during the times mentioned, plaintiff was conducting a fair and exposition at the fairgrounds in Spokane, Washington, and maintained

an office in a building on the fair-grounds, in which was a vault, and that there was a safe inside of the vault.

3. Denies each and every allegation, matter and thing in paragraph 5 of the complaint contained, except that defendant admits that on August 31, 1924, it issued and delivered to plaintiff an insurance policy of which a copy is attached hereto, marked Exhibit "A" and made a part hereof.

4. Denies each and every allegation, matter and thing in paragraph 4 of the complaint contained.

[5]

5. Denies each and every allegation, matter and thing in paragraph 5 of the complaint contained, except that defendant admits that on the morning of September 5, 1924, plaintiff notified the agents of defendant in Spokane, and also the peace authorities of the city and county of Spokane of the alleged felonious abstraction of moneys, and within sixty days thereafter plaintiff furnished certain proofs on forms obtained from defendant; defendant further admits that plaintiff has made demand of defendant for the payment of the alleged loss, and payment thereof has been refused, and further admits that defendant has denied that it is liable for any portion of the amount claimed.

I.

For a further, separate and affirmative answer and defense, this defendant alleges:

That if any of the moneys alleged in the complaint were abstracted, as alleged in the complaint, or at all, the same were abstracted at a time when

the vault and safe doors were not properly closed and locked by either a combination or time lock.

II.

For a further, separate and affirmative answer and defense, this defendant alleges:

That if any of the moneys alleged in the complaint were abstracted, as alleged in the complaint, or at all, and if at the time of the loss or damage, the vault or safe doors were properly closed and locked by combination or time lock, that entrance was effected to such safe and vault by the use of key, and by the manipulation of the locks to such safe and vault.

III.

For a further, separate and affirmative answer and defense, this defendant alleges:

That if any of the moneys alleged in the complaint were feloniously abstracted, it was at a time when the said plaintiff [6] was not regularly open for business, and plaintiff did not have at all such times two watchmen on duty.

WHEREFORE, defendant prays that plaintiff take nothing by its said action, and that it recover its costs herein.

WILLIAMS & CORNELIUS,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

Jas. A. Williams, being first sworn, on oath deposes and says: That he is one of the attorneys for defendant in this action, and makes this affidavit for the reason that defendant is a foreign

corporation, and none of its officers are within the State of Washington; that he has read the above answer, knows the contents thereof, and believes the allegations therein contained to be true.

JAS. A. WILLIAMS.

Subscribed and sworn to before me this 30th day of March, 1925.

E. A. CORNELIUS,

Notary Public for Washington, Residing at Spokane.

Received a copy this 30th day of March, 1925.

GRAVES, KIZER & GRAVES and
RANDALL & DANSKIN,

Attorney for Plaintiff. [7]

EXHIBIT "A."

MERCANTILE SAFE BURGLARY POLICY.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

BALTIMORE, MARYLAND,

(Herein Called the Company).

Does Hereby Agree with the Assured ———, named and described as such in Item 1 of the Declarations forming part hereof, as respects Money and Securities, and such Merchandise as is described in the Declarations and stated therein to be insured hereunder:

(Indemnity Agreements.)

Indemnity for Loss.

I. To Indemnify the Assured FOR ALL LOSS BY BURGLARY occasioned by the abstraction of

any such property from the interior of any safe or vault described in the Declarations and located in the Assured's premises, by any person or persons making felonious entry into such safe or vault by actual force and violence of which force and violence there shall be visible marks made upon such safe or vault by tools, explosives, chemicals or electricity.

Indemnity for Damage.

II. To Indemnify the Assured FOR ALL DAMAGE (except by fire) to such safe or vault and to the said property contained therein, and to the premises including furniture and fixtures therein, caused by such person or persons making or attempting to make such entry into such safe or vault as aforesaid.

Limits of Indemnity.

III. The Company's Liability is limited to the several specific amounts stated in Sections (a), (b), (c), (d) and (e) of Item 6 of the Declarations and subject to such limits as respects each Section, the total liability of the Company hereunder is limited to the amount stated in Item 7 of the Declarations.

Policy Period.

IV. This Agreement shall apply only to loss or damage as aforesaid, occurring within the Policy Period defined in Item 4 of the Declarations or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Definitions.

A. "Merchandise" as used in this Policy shall

mean only such articles as are described in Item 20 of the Declarations "Money" as used in this Policy shall mean bank notes, bullion, currency, coin, uncanceled postage and revenue stamps in current use, United States War Savings Certificate stamps and Canada War Savings stamps not attached to registered certificates, and "Thrift" stamps. "Securities" as used in this Policy shall mean only such bonds, debentures, checks, coupons, demand and time drafts, promissory notes, bills of exchange, warehouse receipts, bills of lading, express and postal money orders, and certificates of stock and deposit, and other instruments, as are negotiable and as respects which, when negotiated, the Assured has no recourse against the innocent holder. "Premises" as used in this Policy shall mean the interior of that portion of the building designated in Item 2 of the Declarations which is occupied solely by the Assured in conducting his business. [8]

Fire-Proof Safe With Chest.

B. The Company shall not be liable for loss of Money, Securities or Merchandise contained in a safe or vault that is not burglar-proof unless taken from an inner steel burglar-proof chest closed and locked as hereinafter provided and opened by actual force and violence as aforesaid, or unless such safe or vault is described and insured hereunder as fireproof only.

Exclusions.

C. The Company shall not be liable for damage to the premises, furniture, fixtures or safes therein, unless such property is owned by the assured or un-

less the Assured as tenant is liable for such damage; nor shall the Company be liable for loss or damage if the Assured, any associate in interest, or servant or employee of the Assured or any other person lawfully upon the premises, is implicated as principal or accessory in effecting or attempting to effect the burglary; nor unless all vault, safe and chest doors are properly closed and locked by a combination or time lock at the time of the loss or damage; nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock; nor unless books and accounts are kept by the Assured and the Company can accurately determine the amount of loss or damage therefrom; nor for loss or damage resulting from or contributed to by fire, or occurring during a fire in the building in which the premises are located; nor for loss or damage resulting from or contributed to by, or occurring during an explosion except when caused by burglars; nor for loss of or damage to plate glass, lettering or ornamentation thereon; nor for loss of or damage to merchandise, furniture or fixtures encumbered by a chattel mortgage; nor for loss or damage caused or contributed to directly by invasion, insurrection, war, riot, strike by the Assured's employees, water or the action of the elements. The Company shall not be liable for loss of or damage to: (1) merchandise unless it belongs to the Assured or is held by him in trust or on commission or sold but not removed from within the safe or vault covered hereby, or unless the Assured is legally liable to the owner

thereof for such loss or damage as is covered hereby; (2) any property in excess of its actual cash value at the time of the loss or damage; (3) pledged goods in excess of the amount actually loaned on such goods by the Assured plus the interest actually accrued thereon at legal rates; (4) securities unless owned or held in trust by the Assured or as collateral for indebtedness to the Assured, or held by the Assured in such capacity as would render him legally liable to the owner thereof for such loss or damage as is covered hereby, nor unless immediately after their loss the Assured shall take all reasonable means to prevent their payment, negotiation, or retirement; (5) money unless owned by the Assured; (6) any property owned by the United States Government or held by the Assured as Postmaster.

Merchandise not Owned by Assured.

D. In the event of a claim hereunder for loss of or damage to merchandise held by the Assured in trust or on commission, or sold but not removed, or for which the Assured is legally liable to the owner thereof for such loss or damage as is covered hereby, the Company reserves the right to adjust such loss or damage with the owner or owners of such merchandise, and payment of such loss or damage to such owner or owners shall constitute a full satisfaction of any claim made by the Assured for such loss or damage. If legal proceedings are taken against the Assured to recover for such loss or damage the Company reserves the right to con-

duct and control the defense in the name and on behalf of the Assured. [9]

Notice of Loss.

E. The Assured upon knowledge of any loss or damage covered hereby shall give immediate notice thereof by telegraph to the Company at its Home Office in Baltimore, Maryland, or to a duly authorized agent of the Company and shall also give immediate notice thereof to the public police or other peace authorities having jurisdiction.

Proof of Loss.

F. Affirmative proof of loss or damage under oath on forms provided by the Comapny must be furnished to the Company at its Home Office in Baltimore, Maryland, within sixty days from the date of the discovery of such loss or damage. Such proof of loss or damage shall contain a complete inventory of all the property stolen or damaged, stating the original cost, the actual cash value of each article at the time of the loss and the amount of loss thereon; a statement in detail of the damage done to the property and premises covered hereby; a statement defining the interest of the Assured in the property for which indemnity is claimed; a statement containing reasonable evidence of the commission of a burglary, as aforesaid, to which the loss or damage was due and of the time of its occurrence; a statement in detail of other concurrent or similar insurance, if any, on the property insured and of the purposes for which and the persons by whom the premises described

herein were occupied at the time of loss. The Assured upon request of the Company shall render every assistance in his power to facilitate the investigation and adjustment of any claim, exhibiting for that purpose any and all books, papers and vouchers bearing in any way upon the claim made and submitting himself and his associates in interest and also, so far as he is able, his employees and members of his household to examination and interrogation by any representative of the Company under oath if required.

Inspection, Suspension, Cancellation.

G. The Company shall be permitted at any reasonable time to inspect the safe, vault and premises covered hereby. This Policy may be suspended by written notice by any representative of the Company until any necessary requirements are complied with to the satisfaction of the Company. This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the Policy Period. If such cancellation is at the Company's request the earned premium shall be computed *pro rata;* if at the Assured's request the earned premium shall be computed at short rates in accordance with the table printed hereon. Notice of cancellation or suspension mailed to the Assured at his business address or at the premises covered hereby, or delivered to him at either place, shall be sufficient

notice and the check of the Company similarly mailed or delivered a sufficient tender of any unearned premium. Reinstatement after suspension shall be granted by the Company in writing only, and the Assured shall be allowed unearned premium *pro rata* for the period of such suspension.

Payments and Replacements.

H. Any indemnity paid for loss or damage under this Policy shall constitute a payment in reduction of the amount of insurance applicable hereunder to such loss or damage. The Company may repair any damage or replace any lost or damaged property with property of like quality and value or pay the true value of the same in money as the Company may elect. Any property for which the Assured has been indemnified by payment or replacement shall become [10] the property of the Company. If recovered or returned, the Company may if it so elect, surrender such recovered or returned property to the Assured who shall thereupon repay to the Company any payment or return any replacement received by him as payment for the loss of such recovered or returned property. The party to this contract recovering any such property or receiving the return thereof shall immediately notify the other party in writing of such recovery or return.

Other Insurance.

I. If the Assured carries other insurance covering such loss or damage as is covered by this Policy,

he shall not recover from the Company under this Policy a larger proportion of any such loss or damage than the amount applicable thereto as hereby insured bears to the total amount of all valid and collectible insurance.

Limitations.

J. No suit shall be brought under this Policy until three months after proof of loss as required herein, has been furnished, nor at all unless commenced within two years from the date upon which the loss or damage occurred. If any limitations of time for notice of loss or damage or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which the premises of the Assured as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

Prosecution.

K. In the event of loss or damage for which claim is made the Assured shall, at the request and expense of the Company, take legal action to secure the arrest and prosecution of the offenders.

Subrogation.

L. The Company shall be subrogated in case of payment of any claim under this Policy, to the extent of such payment, to all of the Assured's rights of recovery therefor against persons, corporations or estates.

Assignment.

M. No assignment of interest under this Policy

shall bind the Company unless its written consent shall be endorsed hereon by one of its officers.

Changes.

N. No condition, provision or limitation of this Policy shall be waived or altered except by written endorsement attached hereto, signed by the President, a Vice-President or Secretary, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract; but nothing in this paragraph shall apply to changes in the written portion of Items 1, 2, 3, 16, 17, 18, 19 and 20, of the Declarations forming part hereof when such changes are initialed by the Agent who countersigned this policy. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

Declarations.

O. The statements in Items numbered 1 to 20 inclusive in the Declarations hereinafter contained are declared by the Assured to be true. This Policy is issued in consideration of such statements and the payment of the premium in the Declarations expressed.

IN WITNESS WHEREOF, the Fidelity and Deposit Company of Maryland has caused this Policy to be signed by its President and Secretary at [11] Baltimore, Maryland, and countersigned by a duly authorized Agent of the Company.

THO. A. WHELAN,
President.

ROBT. S. HART,
Secretary.

Countersigned by

_____.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Burglary Department.

Mercantile Safe Application and Daily Report.

Pol. No. Ms. 405659,
Renewing No. —— New.

General Agent or Branch office,
McCREA & MERRYWEATHER.

Item 1. Name of Assured is SPOKANE INTERSTATE FAIR.

Item 2. Location of the building containing the premises is Fair-grounds, Spokane, Washington.

The portion of the building occupied solely by the Assured in conducting his business and herein called "the premises" is entire.

Item 3. The location of the safe or vault in the premises is First floor.

Item 4. The Policy Period shall be from August 31, 1924 to Sept. 10, 1924, at 12 o'clock noon, standard time at the location of the premises as to each of said dates.

Item 5. The Premium for this Policy is Twenty eight and 75/100 Dollars ($28.75).

The Premium is payable $28.75 in advance.

Item 6. The insurance granted by this Policy shall apply specifically as follows:

Section (a)	In amount of $ nil.	For loss of or damage to Merchandise described in Item 20 and contained in Safe No. 1, the approximate cash value of said Merchandise not exceeding $——.
Section (b)	In amount of $ nil.	For loss of or damage to Merchandise described in Item 20 and contained in Safe No. 2, the approximate cash value of said Merchandise not exceeding $——.
Section (c)	In amount of $25,000.	For loss of or damage to Money and Securities contained in Safe No. 1 the approximate cash value of such money and securities not exceeding $25,000.
Section (d)	In amount of $ nil.	For loss of or damage to Money and Securities contained in safe No. 2, the approximate cash value of such money and securities not exceeding $——.
Section (e)	In amount of $25,000.	For damage to the premises, furniture, fixtures, safes and vault.

Item 7. Subject to the limits specified in Item 6, Section (a) [12] to (e) respectively, the Company's total liability under this Policy is limited to Twenty-five Thousand and no/100 Dollars ($25,000.00

Item 8. (No vault, chest, safe or compartment thereof, shall be considered "burglar-proof" unless it shall have solid steel walls at least one inch in thickness and a door or doors containing solid steel at least one and one-half inches in thickness exclusive of bolt work.)

The Safe or Safes are described and designated as follows:

		Safe No. 1.
(a)	Maker's name—Hall Safe Co.	(a)
(b)	Safe Number, Style or Letter.	(b)
(c)	The safe proper is "Fire-proof only "Burglar Proof" only or "Fire-proof" with "Burglar-Proof" chest (state which):	(c) Fire-proof
(d)	Thickness of solid steel in outer safe door exclusive of bolt work:	(d) ¼ inches
(e)	Thickness of solid steel in middle door (if any) exclusive of bolt work:	(e) ¼ inches
(f)	Thickness of solid steel in inner chest door (if any) exclusive of bolt work:	(f)
(g)	The doors of the safe are locked by combination locks as follows: 1 Outer Safe Door. 2 Middle Door. 3 Inner Chest door.	(g) Combination Key.
(h)	The safe was purchased new or second-hand:	(h) New.
(i)	The safe was originally bought of the manufacturer in the year:	(i) 1909.
(j)	Price paid for safe by Assured:	(j) $75.00.
(k)	The safe is or is not within the vault described in Item 9:	(k) Yes.

Item 9. The vault is described as follows:
Name of Maker of vault door:
National Safe & Lock Co.
55298.
Thickness of steel of vault doors, exclusive of bolt work is: Outer ¼ inches. Inner ¼ inches.

Item 10. A burglar-alarm system connecting all doors, windows, transoms, entrances, exits, hall and partition walls, and ceilings (unless ceilings are constructed of concrete) in the premises, with a central station, will be maintained in proper working order at all times when the premises are not regularly open for business, while this Policy is in force, except as herein stated. Independent flooring of cashier's cage, ticket auditor's window and entire side of office, also auditor has private button at his desk connecting with police department next door, alarm is sounded in police department next door.

Item 11. A burglar-alarm system connecting all accessible windows, doors and other accessible openings in the premises, with a central station, will be maintained in proper working order at all times, when the premises are not regularly open for business, while this Policy is in force, except as herein stated: No.

Item 12. A burglar-alarm system connecting all accessible windows, doors [13] and other accessible openings in the premises, with an alarm gong on the outside of the building, will be maintained in proper working order at all times, when the premises are not regularly open for business while this Policy is in force, except as herein stated: No.

Item 13. Each safe and vault covered hereby is enclosed in a burglar-alarm casing which is wired and connected with a central station, and such protection will be maintained in proper working order at all times when the premises are not regularly open for business, while this Policy is in force, ex*cept* as herein stated: No.

Item 14. A private watchman employed exclusively by the Assured will be on duty within the premises at all times when the same are not regularly open for business, while this Policy is in force, except as herein stated: Two watchmen on duty.

Item 15. The watchman described in Item 14 will make hourly rounds and record same on a watchman's clock, or will signal an outside central station at least hourly, except as herein stated: No.

Item 16. The Assured has no other Burglary, Theft or Robbery insurance, except as herein stated: F. D.

Item 17. The Assured has not sustained any loss or damage nor received indemnity for any loss or damage by burglary, theft or robbery within the last five years, except as herein stated: No exceptions.

Item 18. No Burglarly, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, except as herein stated: No exceptions.

Item 19. The business conducted in the premises by the Assured is Fair and Expositions.

Item 20. The merchandise covered hereby is fully described as follows: Money and securities.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 31, 1925. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [14]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

SPOKANE INTERSTATE FAIR,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

REPLY.

Plaintiff replying:

1. To the first affimative answer of defendant, denies the matters and things therein alleged.

2. To the second affirmative answer of defendant, denies the matters and things therein alleged.

3. To the third affirmative answer of defendant, denies the matters and things therein alleged.

WHEREFORE, plaintiff prays judgment as in its complaint.

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff. [15]

State of Washington,
County of Spokane,—ss.

Thomas S. Griffith, being duly sworn, states; That he is an officer of the within named plaintiff, Spokane Interstate Fair, to wit, its president, and makes this verification for and on its behalf; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

THOMAS S. GRIFFITH.

Subscribed and sworn to before me this 1st day of April, 1925.

[Seal] M. M. ELLIOTT,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 10, 1925, —— M. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [16]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.–4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

JUDGMENT.

The above-entitled cause was heretofore called for trial, a jury impaneled and sworn, evidence was introduced on behalf of both parties and the jury instructed and retired to consider of its verdict; thereafter the jury duly returned into court its verdict in this cause, wherein and whereby it found for the plaintiff in the sum of $15,211.54.

Now, upon motion of plaintiff, and in consideration of the record in the above-entitled cause and the verdict aforesaid, it is CONSIDERED and ADJUDGED that plaintiff do have and recover of and from the defendant the sum of $15,211.54. with interest thereon at the legal rate from the date hereof, together with its costs and disbursements herein incurred.

Done in open court this 8th day of May, A. D., 1925.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington. May 8, 1925, —— M. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [17]

In the Federal Court of the United States for the Eastern District of Washington, Northern Division.

No. L.–4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant.

STIPULATION EXTENDING TIME SIXTY DAYS TO SERVE AND PRESENT BILL OF EXCEPTIONS.

It is stipulated and agreed by and between plaintiff and defendant, that the defendant, Fidelity & Deposit Company, shall have sixty days from and after this date within which to serve and present its proposed bill of exceptions in the above-entitled

cause, and the time for so serving and presenting such proposed bill of exceptions is so extended.

Dated at Spokane, Washington, this 11th day of May, 1925.

GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff.
WILLIAMS & CORNELIUS,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern Dist. of Washington, May 13, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [18]

In the Federal Court of the United States for the Eastern District of Washington, Northern Division.

No. L–4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

ORDER EXTENDING TIME SIXTY DAYS TO SERVE AND PRESENT BILL OF EXCEPTIONS.

This cause came on to be heard upon the stipulation of the parties hereto, through their respective

attorneys, said stipulation providing that the time within which defendant should serve and present its proposed bill of exceptions in this cause should be extended for sixty days from and after May 11, 1925, and the Court having read the stipulation, and being fully advised in the premises,

IT IS ORDERED that the time within which the defendant shall serve and present its proposed bill of exceptions be, and the same is hereby extended sixty days from and after May 11, 1925.

Dated at Spokane, Washington, this 13th day of May, 1925.

J. STANLEY WEBSTER,
Judge.

O. K.—G. K. & G.,
For Plaintiff.

Filed in the U. S. District Court, Eastern Dist. of Washington. May 13, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [19]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,
Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant.

PETITION FOR NEW TRIAL.

Comes now the defendant, and petitions the Court to vacate the verdict of the jury and the judgment entered in this case, and to grant defendant a new trial for the following causes materially affecting the substantial rights of defendant, to wit:

1. Irregularity in the proceedings of the court, jury and adverse party, and orders of the Court by which defendant was prevented from having a fair trial.

2. Misconduct of the jury.

3. Accident and surprise, which ordinary prudence could not have guarded against.

4. Insufficiency of the evidence to justify the verdict and judgment in this:

(a) There was no evidence sufficient to warrant the jury in finding that any of the money was abstracted from the interior of the safe in question by any person or persons making felonious entry into such safe by actual force and violence, of which force and violence there were visible marks made upon such safe by tools, explosives, chemicals or electricity. [20]

(b) There was no evidence that the one who abstracted the money from the safe used any force or violence, or that any tools, explosives, chemicals or electricity were used for such purpose.

(c) If there was any evidence that in the abstraction of the money from the safe any actual

force or violence was used, or that any visible marks were made upon such safe by tools, explosives, chemicals or electricity there was no evidence that such force or violence was used or exerted or applied after the policy of insurance was written and became effective.

(d) If there was any evidence that in the abstraction of the money from such safe, there were any visible marks made thereon, by tools, explosives, chemicals or electricity there is no evidence that such visible marks were made, or that such tools, explosives, chemicals or electricity were used after the policy was written and became effective.

(e) That it conclusively appears from the evidence that if the money was abstracted from said safe at said time alleged and claimed, that entrance was effected by opening the door of the vault and safe, and each of them by the manipulation of the locks on both the vault and the safe.

5. Error in law occurring at the trial as follows:

(a) In denying defendant's motion for directed verdict at the close of all the evidence.

(b) In refusing to give defendant's requested Instruction No. 1 to the effect that the jury should return a verdict in favor of defendant.

(c) In refusing to give defendant's requested Instruction No. 4, and in refusing to instruct the jury that the verdict should be in favor of defendant, if entrance was effected to the safe by the manipulation of the combination lock on the safe. [21]

(d) In refusing to give defendant's requested Instruction No. 5, and particularly in refusing to instruct the jury that the verdict should be in favor of defendant if entrance was effected to the safe by the manipulation of the combination even though the jury should find that knowledge of the combination and how to manipulate it for the purpose of opening the door was obtained through some fraud or by the use of a hole made in the safe door by themselves or others.

(e) In refusing to give defendant's requested Instruction No. 6, and particularly in refusing to instruct the jury that they should find in favor of defendant, unless they should find that the plug in the hole of the safe door under the rim was removed by the alleged burglar.

(f) In refusing to give defendant's requested Instruction No. 7, and particularly in refusing to instruct the jury to disregard the drilled hole, and the removal of the plug therefrom, unless the hole was bored by the burglars, or the plug was removed by the burglars between noon on August 31, 1924, and the time of the discovery that the money had been taken.

(g) In refusing to give defendant's requested Instruction No. 8, and particularly in refusing to instruct the jury that no liability would attach under the policy for any act done by the burglar or burglars previous to noon on August 31, 1924, and particularly for failing to instruct the jury that they could not consider any such previous

act for the purpose of creating or fixing a liability under the policy.

(h) In instructing the jury that "if you further find from such preponderance of the evidence that at the time, or previous to the time of the entry referred to in the complaint the person or persons affecting such entry did so by drilling or drawing out by tools the plug, which had been previously driven into the hole in the safe, and were thereby enabled to [22] affect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe door by reason of such drilling or drawing out of such plug was a visible mark of force and violence upon such safe within the terms and meaning of the policy," and more particularly in that the Court by its instructions permitted the jury to return a verdict in favor of plaintiff, even though the force and violence were previous to the commencement of the policy period.

(i) In instructing the jury that they might return a verdict in favor of the plaintiff "although you should further find that the person or persons who effected the entrance into the safe, and took the money therefrom, during the policy period had previously, to its commencement, removed the plug from the hole in the safe door by drilling or drawing out by tools, and thereby acquired a knowledge of the working of the combination by which they were subsequently and during the policy

period able to effect an entrance into the safe and extract therefrom its contents.

(j) In instructing the jury that they might return a verdict in favor of the defendant if the ones taking the money from the safe did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe by means of which such person or persons were enabled to gain a knowledge of the working of the combination, and so to work the combination and open the safe door, and take the money from the safe, and "that defendant is not relieved from liability because the final act of entering the safe was effected by working the combination on the safe door, and further that if such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the [23] plug in the safe door, and the person or persons so drilling or drawing out such plug thus obtained access to the combination and thereby were enabled to effect an entrance to the safe, they would be liable.

This petition is made upon the records and proceedings in this cause, the reporter's transcript of his shorthand notes, and the minutes of the court.

WILLIAMS & CORNELIUS,
Attorneys for Defendant.

Received a copy this 9th day of June, 1925.

GRAVES, KIZER & GRAVES,
Attorneys for Plff.

Filed in the U. S. District Court, Eastern Dist. of Washington, Jun. 10, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [24]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L–4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

ORDER DENYING PETITION FOR NEW TRIAL.

This cause came on regularly for hearing heretofore, on the petition of defendant for new trial, and the Court having heard the said motion, and being advised in the premises,

IT IS ORDERED that said petition for new trial be and the same is hereby denied, and defendant is allowed an exception.

Done in open court this 29th day of June, 1925.

J. STANLEY WEBSTER,

Judge.

O. K.—G. K. & G.

Filed in the U. S. District Court, Eastern Dist. of Washington, Jul. 7, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [25]

Lodged in the U. S. District Court, Eastern Dist. of Washington. Jun. 16, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

(No. L–4321.)

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial in this court on the 1st day of May, 1925, at 10 o'clock in the forenoon of said day before the Honorable J. Stanley Webster, Judge presiding, plaintiff appearing by its attorneys, Randall & Danskin and Graves, Kizer & Graves, and the defendant by its attorneys, Williams & Cornelius, and a jury having been regularly

(Testimony of Thomas S. Griffith.)

impaneled, whereupon the following proceedings were had and done to wit:

TESTIMONY OF THOMAS S. GRIFFITH, FOR PLAINTIFF.

THOMAS S. GRIFFITH, called and sworn as a witness on behalf of plaintiff, testified, on direct examination, as follows:

My name is Thomas S. Griffith and I reside in Spokane and have since March, 1888. I am president of the Fair Association and have been since 1912. This policy of insurance was taken out by my telephoning McCrea & Merryweather and asking them to put on a burglary and hold-up policy. The policy issued was offered in evidence and admitted and marked "Plaintiff's Exhibit 1" and is, in all respects, the same as set out as an exhibit to defendant's answer. [26]

TESTIMONY OF B. J. SUTHERLAND, FOR PLAINTIFF.

B. J. SUTHERLAND, called and sworn as a witness on behalf of plaintiff, testified, on direct examination, as follows:

My name is B. J. Sutherland and I reside at Spokane and am Bank-teller with the Exchange National Bank, and have been such for about four years. I have been with the bank for close to seven years. At the time of the loss of the money in question I was employed at the Interstate Fair

(Testimony of B. J. Sutherland.)

in the auditor's office as cashier. I took in the money from the ticket seller in payment of concessions and so on. I took in all the money that came in and made all payments. At the close of the day I would count the cash and make up a cash sheet. On the night of September 4th, 1924, I made a makeup sheet as shown by the one you handed me. It shows the amount of gold, silver and currency that we had at the close of business that day. The currency was put into five hundred-dollar packages with a strip around it and the silver—for instance, dollars, when I would get as much as five hundred dollars or more—I would put in a sack and the rest was left in the cash drawer and put in the vault at night. A good deal of the cash was in the safe as I had put it in during the day but the balance was put in at the close of business, that is, that which was put in the safe. Some of the silver dollars and halves, in sacks, were put on the vault floor as there was not room in the safe for it all. At the close of business that evening I put in the safe thirteen thousand dollars in currency in five hundred dollar packages; seven hundred and fifty of this was in big bills. All of it was in the safe with the exception of thirty-five hundred dollars in silver which was in seven sacks of five hundred dollars each on the floor of the vault. As money was taken in during the day I would write [27] out a receipt for it and make a duplicate and deliver it to the auditor for the

(Testimony of B. J. Sutherland.)

purpose of making up his books. At night after the cash was counted the auditor would ask me how much I had and I would tell him the amount and he would say "O. K." or "That is all right," or whether *I* was or not. After the money was put in the safe on this night I soon left for home. I was the last to leave the office. I did not have the combination of either the safe or vault. Mr. Reinhard had the combination. I know of no others. I did not close the outer doors when I left or lock them as there wer employees in the outer office. At the start of the fair Mr. Reinhard gave me a check for one thousand dollars with which to get change to take out to the fair. That amount is charged against me but there is no receipt written for that and consequently does not figure in the amount of cash that I reported to him that night. Now, then, on Thursday morning he gave me a check for five thousand dollars with which to pay these horse men, track men, and that, with the one thousand dollars, makes the six thousand dollars that I deduct in the statement which you have of the cash for that day. Of course there was no receipt written for that and consequently I deducted that in reporting to Mr. Reinhard the total amount of cash to make up the day of receipts; that does not affect in any way the amount of cash that went into the safe; that belonged to the fair; it is just charged to me instead of having the receipt made out for it.

(Testimony of B. J. Sutherland.)

(Makeup sheet identified by witness admitted in evidence and marked "Plaintiff's Exhibit No. 2.) [28] There were several parcels in the safe that night with money left by concession men. We did not know the amount of these. The concession men brought us, from time to time, things they wanted to leave for safekeeping. For instance, one man said he couldn't get to the bank and would like to leave some money there. We put that in a sack and put a string around it with a check on it and gave him a check with the same number. This was something like a baggage check, and that was left in the vault on top of the safe. I think there were three who had left packages that night but I do not know the amount of money. They were not put in the safe. I left that night about twenty minutes after ten and returned the next morning about ten minutes after eight. Mr. Reinhard and Mr. Perry were in the office. Mr. Perry is a race-track man; also Mr. Askins who has charge of the tickets. He is with the postoffice. The first thing when I came in Mr. Reinhard beckoned to me and took me over to the cage and pointed to the vault and says, "Do you see anything there?" I didn't see anything. There was nothing unusual that I noticed right at first and then he asked if I noticed that the sacks were not there. Then of course I noticed that they were gone. I noticed the vault door was open and the safe stood ajar and that was unusual because Reinhard didn't

(Testimony of B. J. Sutherland.)

usually open the safe until I got there. The cage door was closed and Reinhard said not to go in there until the detectives came. I did not go in until after the police officers came. I was there at that time. I later went in and discovered that the money was gone from the safe. We have little trays in which we keep our little silver; these were brought out from the bank and I handled these just as we do at the bank and [29] when evening came I put the trays in the safe leaving the money right in the tray as we used it in during the day. The trays at this time were out of the safe and on the shelf of the vault and were empty. These stood on the counter back and showed no evidence of haste and evidently the money had been picked out of there. It showed that it had not been dumped because the rubbers and things I had in the center of it were undisturbed.

Mr. GRAVES.—We do not claim the right to recovery except for the money that was in the safe.

WITNESS.—(Continuing.) When I put the money in the safe and went out on the night of the 4th Mr. Reinhard happened to be in the vault, and before the safe door was locked I said, "I will look again to see that there is nothing left out." After making the examination I said, "All right," and Mr. Reinhard turned the combination. I saw him do it. He immediately closed the vault doors and locked them with the combination. The vault door

(Testimony of B. J. Sutherland.)

locks with the combination just like you throw on any safe.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

The money we received during September 4th came mostly from ticket sellers and some from concession people and some as payment on contracts and things of that sort. This money from ticket sellers was from those on the fair ground. There were some cash receipts on that day in checks but it was mostly gold and silver. I did not keep a record of the checks. My duty was to account for all money received. Exhibit 2 does not show the checks received; it is limited entirely to currency and cash. On the evening of September 3d I placed all the money in the safe as usual. I started business on the [30] 4th except that at about 8:30 or 9 o'clock in the morning the bank comes out and gets the deposits and left one thousand dollars for change purposes, but on this particular morning left five thousand dollars additional. Therefore, after they got there I had six thousand dollars to start with that day. Under our arrangement with the bank they came out for the money in the morning. We didn't get much money in the morning except, possibly, payments on contracts and things like that. The payments on contracts might be either by cash or check. Practically the entire crowd for the fair were within the gates prior to 2:30 or 3 o'clock. The first ticket

(Testimony of B. J. Sutherland.)

sellers began to come in about 2:30, I should say, turning in the money that had come in to them. The first ticket sellers who came in were the ones on duty earliest in the morning. I think there were only three or four of them. The bulk of the ticket sellers didn't come in until around five or six o'clock. Of this five thousand extra that was left with me for the purpose of the horsemen some of it was used that day for paying checks. I don't recall exactly that we paid horsemen that day but whenever there were large checks to be cashed we had to use the large currency. The cage which I referred to was a lattice steel bar cage about four feet wide and, I should say, ten or twelve feet long, and I should say about seven feet high. The lattice work entirely surrounds the opening and there is an open door that latches on that cage, and by opening the door to the cage you gain access to the door of the vault and the vault door is probably six feet high and a little wider than three feet and has a combination lock; the interior of the vault is about ten or twelve feet square and all masonry. The vault faces east. After [31] you enter the vault door this safe was up against the north wall of the vault and faced out and was probably six feet from the vault door. The safe is about 2½ feet each way and set up on a little platform about 2½ to 3 feet high from the floor. The door of the safe faced south. When I got there on the morning of September 5th the

(Testimony of B. J. Sutherland.)

vault door was open. If it had been locked the night before then someone had unlocked it before I got there. I do not know whether anyone had got into the interior of the vault before I reached there. In any event the safe door was entirely open at that time. I first entered the vault that morning about half an hour after I arrived. I do not think any others entered during that time or before the police came. Chief of Police Turner, Finger Expert Jordan and several other officers were there. When I went inside the vault I looked the safe over. I looked around inside the vault to see anything that could be discovered and to see how the money might have gotten away. I made a pretty careful search at that time and on some subsequent occasions, from time to time, as I had leisure I would look around in there with the idea of probably finding out some way that they might have gotten into the vault without going through the door. The thirty-five hundred dollars in silver in bags was not within the safe but was in the vault proper—five hundred dollars in each bag. Those seven sacks were gone. In the safe the silver consisted of two hundred and seventy-seven dollars in dollars, one hundred seventy-nine dollars in halves, one hundred sixty-two dollars and seventy-five cents in quarters, ninety dollars and ten cents in dimes, nickles and pennies. They did not take the pennies. When I left the night before there was no one there except the employees

(Testimony of B. J. Sutherland.)

in the outer office. The last ones to leave previous to my going was Mr. Reinhard and some of his family. They left probably a minute or so sooner. I put the money [32] in the safe from time to time during the day as it accumulated.

TESTIMONY OF L. F. REINHARD, FOR PLAINTIFF.

L. F. REINHARD, called and sworn as a witness on behalf of plaintiff, testified, on direct examination, as follows:

My name is L. F. Reinhard and I have resided in Spokane since 1908 and am a certified accountant and was in the employ of the Fair Association and was auditing in the fall of 1924. My duties would last pretty nearly all the year. I have been auditor for the fair since 1909. The cash comes in from various sources,—advertising, sale of space, and admissions. The admissions are taken in by ticket sellers. They start coming in along about 4 o'clock. They come in and make up their money, roll it up and count it and as soon as they come out right on that they go up to the ticket auditor and he figures on his report how much they should have. He turns in this report to this cage that you were talking about to the cashier and the cashier is supposed to see that he gets that much money as called for. The cashier then has the money and he always makes up his money in

(Testimony of L. F. Reinhard.)

the middle as fast as he finds time and puts it into the safe so that as little money as possible is outside. The cashier issues receipts in triplicate; the original he gives to the party who pays the money. When a sheet of five is filled it is torn out and handed to me, from which I write up the cash received book, and the triplicate receipt is the book of permanent record. When we come to close up in the evening I see that I have written up my cash book his last receipt. I figure the books and take the difference [33] between the footing that night and the footing in the morning and if the amount agrees with what my books show that he should have we quit for the day and go home. My books show the total receipts for the year to the close of September 4th was $86,770.20. The total receipts at the beginning of September 4th were $72,816.83; the difference was the day's receipts $14,953.37. There were some checks in this. My books do not distinguish between checks and cash. Before I went home that night I saw all the money in sight in the cashier's cage put into the safe. I did not myself count the money. The cashier shut the door of the safe and I turned the combination. I locked it. Then I started to leave the vault, shut the inner door, reached out and turned off the vault light, shut the vault door, took my coat and hat and went home. I threw the combination on the vault door and saw that it was closed. When I left Sutherland was still there in

(Testimony of L. F. Reinhard.)

the auditor's office. There were possibly five or six in the outer office. This was about a quarter after ten. I got back the next morning at five minutes to eight. There was nobody then at the auditor's office nor anybody in the outer office. I entered the building through the police office and went in to the back room, hung up my coat and started to open the vault as usual. I opened the vault and the minute I threw the vault door open I saw the inner safe door folded back—open, and some of the contents of the safe, like trays and the receipt-book, on the shelf on the north side of the vault. I hollared out, "We are touched." I immediately went to the telephone and called up Mr. Griffith. Then I just sat there and didn't let [34] anybody go in that cage or vault or anything until the insurance people came and the police came, and when they were there then we went into the vault. I asked Mr. Griffith to notify the police and I suppose he did. The police got there around 9 o'clock. Mr. Williams and Mr. McCrea came out representing the insurance company. They got there either a little before or a little after the police came. When we went in to the vault all the silver was gone. Everything on top of the safe was gone and all our money was gone except $10.86,—that is, the roll of pennies in the safe in those trays were left and the loose nickels and pennies on the change tray were left. That was all that was left. This money

(Testimony of L. F. Reinhard.)
that was taken, was in the safe all belonged to the plaintiff.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

We did not pay out very much on that day to the horsemen. The purpose of the five thousand dollars extra money delivered to Mr. Sutherland on that day was principally to cash checks for running horsemen. They quit on Thursday and go home. The demand for that money would not arise until late in the day. You can't tell,—they may come in early in the day and want the money for the first three days of the week. We had not held any extra money out for any purpose on Wednesday or Tuesday. On Monday and Tuesday and Wednesday Mr. Sutherland began his duties with only one thousand dollars for change, but on this day there was an additional five thousand dollars given him. Our receipts on that particular day—the cash and checks—until along about four o'clock amounted to five hundred sixty-five dollars. That is all we took in from receipts up to that time. Of the five thousand dollars, as it happened, there wasn't hardly any used this year. When I arrived on the morning [35] of September 5th the vault door was locked and the combination thrown. I threw the tumblers the night before. I turned them half a dozen times, and the vault door could not be opened by just simply turning back to a certain point. There were some inner doors to that vault;

(Testimony of L. F. Reinhard.)

they were folding doors. They were not locked in any manner; there was a lock on them but we never used it. The lock was a common one. I opened the vault door in the usual way as usual, and it responded to my manipulation of the combination in the usual manner. When I opened the vault door the inner doors of vault were opened. I had left them closed the night before. The light was out in the vault. I turned the light on after I opened the outer door. The switch for the inside light was on the outside of the vault. We all went in right away after the police came. I did not look to see how entry had been effected to the safe or whether there were any marks on the safe. We had to go to work when the police were there and left them in charge. The chief of police, the chief of detectives and two or three others were there and the prosecuting attorney finally came. When I left the night before the parties who were in the outer office were Mr. Semple, Mrs. Semple, Arch Shale and Mr. Randall, the attorney. Mr. Semple might be called the boss of the Fair, next to the president. He has to do with the business and all the outside of the office.

TESTIMONY OF E. C. SHEA, FOR PLAINTIFF.

E. C. SHEA was called and sworn as a witness on behalf of the plaintiff, testified, on direct examination, as follows: [36]

(Testimony of E. C. Shea.)

My name is E. C. Shea. I reside at Spokane and am superintendent of the Spokane Interstate Fair. I do not know who was the last person to leave the office the night the safe was robbed. I left at 11:05. There was nobody in the front office when I left. I can't say whether there was anyone in the auditor's office. I didn't go up there. When I left I put the padlock in the door leading to what we call the main office and snapped it. That is the front door leading from the midway to the office. The auditor's office is in the rear of our office.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

The door that I put the padlock on is the one which opens from the fair-grounds proper. It was the south door on the south end—the extreme south door. It is not the door that directly connects with the auditing department. When I locked this door there was nobody still in the front office. I do not know whether there were any in the police department office. There are some other doors entering, either one of which would give access to the interior of that building.

TESTIMONY OF JOHN C. SEMPLE, FOR PLAINTIFF.

JOHN C. SEMPLE, called and sworn as a witness on behalf of plaintiff testified, on direct examination, as follows:

My name is John C. Semple and I have resided

(Testimony of John C. Semple.)

at Spokane practically all of my life and am a mining engineer and am known as assistant to the president of the Spokane Interstate Fair. I have drawn a general plat of the fair-ground and of the building. The ones which I produce are to the best of my knowledge a correct plan of the fair-grounds. [37] The oval represents the race-track. The building marked "grand-stand" is the grand-stand and this is a correct picture. The part to the south end of the grand-stand which is not marked, that is, the main office are business offices. The grand-stand is all one building under one cover. There are open spaces, however, underneath. The grand-stand comes right down within a few feet of the tracks. The first row of seats is back ten or twelve feet from the edge of the track and there is a walkway in front of the grand-stand along the edge of the tracks. I have a plan of the particular building.

(The plan in question was produced and admitted in evidence as Plaintiffs' Exhibit 3.)

There is unused space under the grand-stand,—under the seats. So far as that plat is drawn the figures and marks on it are all correct and it is drawn to scale, which is a quarter of an inch to the foot.

(Plat marked "Exhibit 4" was admitted in evidence.)

Exhibit 4 shows better the hole under the grand-stand. The hole is shown here. The side of

(Testimony of John C. Semple.)

the building is covered with material 7/8ths of an inch thick and 3/4ths of an inch wide—siding you might call it. Three of these boards were cut off as shown here on both ends, and these boards were fastened together on the back inside, that is, so that they could not be seen, with straps nailed across each to each end of these three boards and then there were leather hinges put on to that. That made a door—made it small, and there was leather hinges put on to that on the side so that it could not be seen and hung from the top. With the exception of the saw marks it fit into the space. In Exhibit 4 there is shown at the northwest of the auditor's office a table and under that is a hole two feet and two inches in length and this is shown also on this No. 5. The size of both of these holes [38] is as marked on the plat. This partition wall is made by 2 by 4's vertically there and there is what is commonly known as ceiling nailed on the inside. That is, this is sealed on the inside from the auditor's office. On the outside there is no covering of any kind over the 2 by 4's. That door through there was made by cutting off in behind the 2 by 4 with some kind of a thing—hacksaw blade or something. This hole was cut in the inside right next to the 2 by 4. After that was done another 2 by 4 was put up along the side of that 2 by 4 so that from this side you could not see the cut. Under this table right here there was put up a 2 by 4 right here back of the table against the

(Testimony of John C. Semple.)

wall. There was a 2 by 4 placed lengthwise with the table going that way. It looked as if it might be a support for the back of the table. These boards that were cut were then put together with a very narrow strip of wood and six screws put together with screws. The screw holes were countersunk and the strip that was on this end over here was practically the end of the slide. If this would be the whole piece this is practically at the end and a piece had been cut off behind the two by four that was holding it on the outside so that the cleat itself was hidden and went back out of sight. The slide would be opened by sliding it behind the 2 by 4 that was supposed to hold it in place.

(Map marked "Exhibit 5" was admitted in evidence.)

I have the photograph showing the hole. That shows it though not as it was. I believe the police have the door in their possession; they took it away and that is just patched up there now.

(Photograph identified by witness admitted as Exhibit No. 6.) [39]

Here is a photograph that shows the hole under the table. It was taken from the office. It does not show the hole as it was when we discovered it but as it is at present. We patched it up. The police took that door away. That photograph shows the table that has been referred to.

(Photograph admitted in evidence as Exhibit No. 7.)

(Testimony of John C. Semple.)

This photograph shows the corner where the hole was located and as much of the office as we could get in there and shows the position of the vault door and the cashier's cage.

(Photograph admitted in evidence as Exhibit 8.)

This photograph shows the location of both holes —that is, underneath the grand-stand. It was taken underneath the open space that I referred to. Here is the patched hole leading to the auditor's office and the patched hole coming in from the outside.

(Photograph admitted in evidence marked Exhibit 9.)

This photograph is one of the back of the main office, part of the grand-stand showing the location of the three doors that enter that part of the building.

(Photograph admitted in evidence marked Exhibit 10.)

On the night of the robbery I left the office at the fair ground about twenty minutes to eleven. It must have been eleven before I got off the grounds. When I left the office I believe the only one right in the office was Mr. Randall. When I speak of the office I mean both the main office and the auditor's office. I think I spoke to him right in the passageway coming out towards the front door. I was right around the front there somewhere. I think it was about 8:30 when I got there the next morning. Mr. Reinhard, Mr. Perry, Mr. Sutherland, and I think, Mr. Askins, was there. I am practically certain that the police were there. I do not think

(Testimony of John C. Semple.)

the [40] people from the insurance company were there but I believe that they came right after that. I inspected the vault and safe that morning. I found the condition about as has been described here. For the purpose of trying to find out how they got in on Friday morning I called the manager of the Burns Detective Agency and engaged them to try to find out how this was done. We already had one of the Burns people out there working for us and they assigned others immediately to work on the thing who were there with the police officers and the city detectives. They made an investigation here and in other places so far as we thought was necessary. That whole place under there—that space in the center east of that small storeroom and in through there and all through that part of the building—was examined in a rather hurried sort of fashion by the Burns Detective people and I believe by the city police, all working together. That was immediately afterwards. However, on going on with the fair it could not be done in a proper sort of manner so that it was Sunday morning when the city detectives, Mr. Randall and myself were there and started a systematic search. We were all together going through there and Mr. Hudson, the city detective, was back in the southeast corner of the grand-stand underneath and noticed these cleats and then called it to our attention and we could see it of course, and after that was discovered it was only natural to suppose that there was some way in to the main office, and they started

(Testimony of John C. Semple.)

to search for that and went systematically, and then we discovered the hole under the table. That was Sunday morning following the robbery. With reference to my investigation of the condition of the vault and safe doors on Friday morning, September 5th, Mr. Randall called Mr. Bolt, a locksmith in Spokane, and he at that time came out to examine the vault and safe doors and mechanism, [41] and together with the detectives and some of the officials of the fair we went over the vault and safe doors. At that time we didn't see anything the matter with the safe. Mr. Bolt could find no evidence of anything the matter with it. On the vault door there was a bolt that works vertically on the lever or when you turn the handle it throws that through a lever or it throws one bar up or just throws one bolt up. They found that that set screw had been cut off or taken out of there leaving the bolt disconnected with the lever arm, so when you turn the handle that bolt would not work. The lever arm had been taped with electric friction tape. The various parts of the mechanism of the bolt had been freshly oiled. That is about all that was found at that time. Some time later the firm of Graves, Kizer & Graves were employed by the fair and Mr. Kizer wanted to look the thing over—the situation at the fair-grounds, and see what he could find there. So he asked if I could engage a locksmith to go with him. He also arranged for me to go out there. It just happened that afternoon I had to go to the courthouse for some other papers and I told them

(Testimony of John C. Semple.)

when they went I would go with them, so Mr. Kizer, Mr. Corey, the locksmith, Mr. Reinhard and myself went to the fair-grounds. We got in there and got the safe open and Mr. Corey didn't have any tools with him to take the door apart or anything like that, so I left him and went down and got some old tools that were on the ground and asked him if he could use them. He said he didn't think he could but would try to then I went to look for some more and when I came back I found that he had succeeded with those old tools in taking the mechanism out of the door. Mr. Kizer was the only one that was with him at that time and then he took that apart exposing a drill hole through the door. At that time the outside was off also. When I came back Mr. Corey [42] showed me a mark on one of the tumblers that looked bright and shiny compared with the rest of the brass—looked like the point of a drill had struck it. After this was found I phoned Mr. Griffith and told him regarding what we had found there and it was late in the evening and I called the police department and asked them to send a man right out to the fair. I then called Chief Turner and told him and he said he would be right out and that he would notify Capt. Burns and bring him too. And soon after that Chief Turner and Capt. Burns arrived up there. "They seemed to doubt—"

Mr. GRAVES.—No, never mind that; just tell what was done. Of course they seem to doubt.

WITNESS.—(Continuing.) Mr. Corey was

(Testimony of John C. Semple.)

asked to explain and show how a safe could be opened through such a drill hole and he did do so. He used a large flash-light and he worked for quite a little while without much success and finally some one suggested that they turn the light off in the ceiling of the vault, so it was turned off. Corey had been working for some time on this and finally let his hand drop with the flash-light in it and it threw the beam or light down on the stand on which the safe rests. The minute he did that these steel drillings, or whatever you would call them, showed up very plainly in the bright light of the flash-light held a few inches away from them. That is the way the filings were discovered. The safe stood on a wooden stand and that wooden stand was a little further out in the front than the front door of the safe—two or three inches or something like that. These filings, when I first saw them, were on the board that extends out beyond the end of the safe—the boards of the platform on which the safe stands. There were some on the floor. I didn't see any more than perhaps a foot or a foot and a half away from the [43] front of it. The police took some of the filings right then and there. They didn't take any part of the safe or its mechanism. The door of the safe was taken off the day following the discovery of the hole and was taken to my office first and then direct to the Fidelity National Safety Deposit Vault and deposited to the order of Graves, Kizer & Graves. It was taken from the safety deposit vault yesterday and put in the clerk's office, and I

(Testimony of John C. Semple.)

brought it into court to-day. There were some of the filings taken. Mr. Goodspeed, Mr. Corey and I went back and took a magnet and got all the filings we could that were left there on the support that the safe is on and from the ground and put those filings in a small vial and Mr. Goodspeed took them and they have been in his custody ever since.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

The disappearance of the money was found on the morning of September 5th. The presence of the door that has been referred to in the grandstand and also in the auditor's office was discovered on the 7th. The presence of the tape on the bolts of the vault door and the missing screw from the arm was discovered on September 5th and the bored hole which I have testified concerning in the safe door was discovered on the afternooon of September 24th. I first knew of the shavings on the same evening—September the 24th. At the time the shavings were discovered Chief Turner, Capt. Burns and Detective Hudson, of the police force, were present. This was around 7 o'clock in the evening. There are three doors leading into that building from the west. The first is the manager's door, the next is the police entrance and the next is sometimes referred to as the "speed office" or "press office." Anyone passing from the auditor's office going toward the west [44] will have to pass very closely to the police table and it would be rather difficult for anyone to get out, especially if there are many

(Testimony of John C. Semple.)

people around, without attracting attention. The distance from the police desk to the auditor's office would be in the neighborhood of twenty feet. Outside of the passageway coming from the auditor's room down to the point where the police room was and taking the passage and going north there was no known outlet or way of getting out of the auditor's office at that time. Later, however, there was discovered the other way which I have mentioned. However, it was to the south end of the auditor's office a latticed window with steel wires across but nothing had been disturbed at that point. That was examined on the morning of the 5th.

At that time, on September 5th, I investigated and examined, for the purpose of discovering any kind of a clue, as to how the entrance could have been effected, and this was being generally done by the fair officials, the police officers, the employees of the fair and others, and there were several police officers from the detective force of the city of Spokane out there looking things over that day, and they spent practically the entire day of the 5th going over that situation. After that, with the exception of the morning of the 7th, there was not very much work done in examining the premises up to the 24th. Luke S. May, from Seattle, went over the situation out there and spent a few minutes one day but did not make a close examination of the vault. On the morning of September 5th, when the loss was discovered, Chief Turner, Officer Jordan, the finger-print man from the police station, and

(Testimony of John C. Semple.)

two or three other officers from the detective force of Spokane were there. There was [45] also present a Burns detective man. I wouldn't say that they spent a great part of that day; I think they completed their work in a couple of hours. I saw some of these officers going over the interior of this vault, over the walls and flooring and the ceiling; that was all gone over. I did not see any of them using a magnifying-glass. I know they made an examination for finger-prints. The only time I recall seeing Officer Self was the 5th. Detective Burns was there on the 5th and the 25th. From the morning of the 5th to the evening of September 24th there was lots of officers around these platforms and the Fair Association had on the premises some private detectives. The safe stood on a platform nearly as high as that desk and the outer edge of the desk extended out beyond the side of the safe. I did not see these steel shavings which I have referred to before Corey had taken out the combination and had discovered this hole, and did not know of their presence before then. I had not seen them so far as I know between the morning of the 5th of September and the afternoon of September 24th. I had heard nothing of the presence of shavings during that time. There wasn't a great amount of shavings. They were scattered pretty well over the front of that platform. That box is just about the same width as the safe and there were a few scattered all over that. We had a hard time, after the police took what they had, to get any left.

(Testimony of John C. Semple.)

There were very few there. There was also a few on the floor. The boards on which the safe rested were rough. After we discovered the shavings we could see them very plainly. There was no little pile of them. I don't think there was anything lying on the floor on which the safe rested in the way of books or anything unless there was something at the back end. [46] There was nothing within a foot or so of the front end,—nothing in the way of a tray or ticket holder. There may have been some scale weights back under there. I have seen these scale weights around there for a long time; they were not on the floor. I did not look to see whether there were any shavings on the scale weights. I know of a paper-holder—a roll that goes under the safe. I saw that there on the morning of September 5th; it must have been there September 24th but I don't remember seeing it. On the 5th it was in back there. I know that there were lots of other things in back of that safe; I don't know what became of it. The police took a lot of things and they may have taken that for all I know. I did not look at the paper-holder on the 24th to see what it showed. I have had something to do with the books of the fair association. The books of the fair association are in court now.

Q. Can you say whether these books show anything with reference to any work done on this safe in August or September, 1922?

Mr. GRAVES.—To that I object as not cross-examination.

(Testimony of John C. Semple.)

The COURT.—Objected to as sustained on that ground.

Mr. WILLIAMS.—That opens up the question of how the hole came to be there.

The COURT.—That is not proper cross-examination.

WITNESS.—(Continuing.) I never saw the hole in the safe until the night of September 24th and all I know about it is that we found the hole at that time and saw some of these shavings. What I meant by the screw being cut off from the vault door was that it was missing. On the vault door there are two or three [47] bolts that extend upward and engage in the top wall of the vault and that is true also of each side and at the bottom; these bolts are operated by some kind of an arm mechanism. As to one of these bolts that went upwards what I found was where the arm connected with the bolt the screw was missing. The other bolts were still working. The result of this was that when the knob of the vault door was turned all these bolts, with the exception of the one where the screw was missing, went into place or were withdrawn from their place, and with the screw missing, when the knob was turned the door was locked. This did not prevent the locking of the door. The adhesive tape was on the top of the arm that operated this bolt where the screw was missing. I don't know how the adhesive tape came to get there or who put it there. There was the presence of the adhesive tape, the missing screw and the

(Testimony of John C. Semple.)

fresh oil. I do not know how the oil came to be used or who used it. My attention was first directed to the adhesive tape, the oil and the absence of the screw on the 5th—the day the burglary was discovered. I know nothing about how to account for these steel shavings except to say that I saw them there. I found by looking at the boards covering the hole in the grand-stand that two of them appeared to be very old and the cut at the end appeared to be very old. As to the third one of these boards it appeared as though it had been cut very recent and the ends painted enough to hide the newness of it with white or gray paint. I know nothing about when this board was painted. With proper knowledge it would seem easy to see these short boards in the grand-stand. If a person went to look for them they probably never would see them; if they went there and knew they were there you could find them easily. The door was [48] held in place by one screw. From this hole to the hole in the auditor's room it was not to exceed twenty feet. In going under the grand-stand from this hole to the one in the auditor's room for a part of the distance you could stand upright. After this hole was cut in the auditor's room there was something on the inside of the room that was not needed and which did not belong there.

Mr. Reinhard, Mr, Griffith and all the rest of us were very familiar with the interior of this room—had all been with the fair for some years before. This thing that did not belong there was a 2 by 4

(Testimony of John C. Semple.)

extending from the floor up to the height at which these boards were sawed and in a way hide the cutting of the boards. When we found the hole we knew there was no structural reason for the 2 by 4. I have no knowledge as to when the hole was cut there. I never knew of it until Sunday, September 7th. I believe there was an auger hole to start for the cutting of these boards. It was toward the top. At the back of the place where this hole was cut there was a 2 by 4 to which the boards were nailed which was the regular construction of the building. I did not notice whether the auger, as it passed through the boards, struck that 2 by 4. The place where the oil and the adhesive tape appeared on the vault door was on the inside. The door had to be opened for that adhesive tape and oil to be applied. I have no idea how long the screw had been missing. Whenever the mechanism of the vault door was operated it could be easily seen whether that bolt was working or not if the door was opened. The adhesive tape, this missing screw and the oil was in plain view whenever anyone was on the inside of the vault or the door was opened. [49] There was considerable dirt on the platform on which the safe rested on September 24th. The reason for myself, Kizer, Reinhard and Corey going out there on September 24th was the Fair Association had decided to engage Graves, Kizer & Graves to look into the matter for them and Mr. Kizer had an idea that any kind of a mark on the safe was evidence and that there must be a mark of

(Testimony of John C. Semple.)

something there if it could just be found. We were looking for a chance to prove that that had been opened forcibly. Randall and Danskin were regularly engaged by the Fair and had looked into the matter. Graves, Kizer & Graves had been employed a few days before September 24th, and previous to that time it had a lock expert, Mr. Bolt, out there; but on this particular occasion we took Mr. Corey, who is a lock expert, for the purpose of getting another opinion. Bolt had gone over the safe for us previous to this. I did not, when I went out there on September 24th, know there was a hole in the safe. I had no knowledge about the hole at that time. In the auditor's office there is a connection with the toilet and the only way to reach that toilet, so far as known to the fair officials, was through the opening at the entrance from the west, and this toilet was supposed to be used during the night-time by employees of the office. I don't know how frequent the travel was during the night-time but there was some travel and the door of the auditor's office was kept open and the lights were left burning in the auditor's room—seventeen of them—some of them 100 watts or over, and it made it very light in there, and that was kept throughout the night. The police officers on duty at night were not [50] city police but were employees of the fair. Mr. Bolt went out there on September 5th and he changed the combination on both the vault and safe at that time. I believe Capt. Burns, Chief Turner, De-

(Testimony of John C. Semple.)

tective Hudson—there were a number of them—were there and they all saw the steel shavings practically simultaneously. I was standing further outside than any of the others. I stuck my head inside where I could see them; I did not recognize anything as a part of a steel plug; if there was any steel plug or the remains of a steel plug I did not see it.

On redirect examination by Mr. GRAVES, the witness testified as follows:

The edges of the boards to the cut in to the auditor's office looked fresh to me. This hole cut in the grand-stand might be said to open to an entrance to the gateway. All around that fence is planted in shrubs and bushes, some of them growing almost as high as the fence. The man from Seattle didn't do much of anything. I went out to the fair-ground with him in a Dodge car driven by Detective Hudson, Keenan, I believe, was there, Chief Turner and Commissioner Smith's secretary, Dunning,—and I was introduced to this Mr. May, and when we got out there we went in the vault, I believe, first. The safe door was shut. This was some time before the 24th—before the drill hole was discovered. We just looked around the general situation. I asked if they wanted the safe door opened and he said it didn't make any difference but finally I did open it for just a second and it was shut again.

The toilet in the auditor's room was not supposed to be used at night except by watchmen and the police we kept there guarding the grounds and the

(Testimony of John C. Semple.)

building. No one [51] else under the rules was to be permitted to enter the fair-grounds.

On recross-examination by Mr. WILLIAMS, the witness testified as follows:

I think there were about twenty-three or twenty-four on duty at the fair-grounds during the night, and during the daytime, when the fair was opened, there was a multitude of people around. During the year, until two or three weeks before the commencement of the fair there was only one man lives on the grounds, but commencing with that time until the fair opens there are quite a number of employees,—carpenters and workmen of various sorts getting ready. The shrubbery that I referred to—it commences about seventy-five feet from this hole in the grand-stand.

TESTIMONY OF L. F. REINHARD, FOR PLAINTIFF (RECALLED).

On direct examination by Mr. GRAVES, the witness testified as follows:

For the last twelve years I used to start the cashier out with seven hundred fifty to one thousand dollars on Monday morning. Then on Thursday I gave him five thousand and on Friday another five thousand, so that he had about eleven thousand dollars at the end of the week to cash these checks. I have my ledger here that goes back ten years and shows that. Toward the end of the week we had to cash checks, pay off horsemen and performers and people of that kind. This loan is entered on my books. The inner

(Testimony of L. F. Reinhard.)

doors of the vault are locked with a key and there is no combination lock for such doors. Before September 4th Mr. Griffith, Mr. Semple, George Nuttleton and myself had the combination to the safe. George Nuttleton was for years our ticket auditor but during this year he had gone about a month before to New York and on that particular day was in [52] San Francisco and I had got Mr. Sutherland in place of him. I saw this tape on the vault bolt on Sunday after the robbery. I put my finger on it and it still stuck. Previous to the robbery I had observed that the vault door had been freshly oiled. I had given no instructions to anybody to oil it. It was the duty of our superintendent, Charles Lamb, to see that everything was in good working order. All the people who had the combination to the safe and Charles Lamb had the combination to the vault. The combination to the vault door was set on two numbers and on the safe four. I said the vault had two. It had at least three and I think four.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

In addition to the ones I mentioned W. G. Hannon also had the combination to the vault but he wasn't there this year. He was not here in Spokane since the early part of 1924 when I last saw him. So far as I know Mr. Hannon didn't have the combination to the safe. I never gave it to him. On the morning following the robbery I stated that Mr. Griffith and myself had the combination to the safe.

(Testimony of L. F. Reinhard.)

I forgot about George Nuttleton. He wasn't in town and he wasn't in any way interested. I did not then know that Semple had the combination but he told me that he had it afterwards. I will say further frankly that I was not all there after we discovered it. I might have overlooked a trifle which now becomes material.

Mr. GRAVES.—What do you mean by saying you wasn't all there?

Ans. Well, the shock of opening the door and the questions by the police and the insinuations didn't set very well and I wasn't quite there. I might or might not have known that Mr. [53] Semple had the combination. I knew that Mr. Nuttleton had it. I do not carry the combination in my mind from one year to another. I carry a card in the small brief-case or small pocket-book and carry it in my hip pocket. To 1919 I had a little memorandum-book and I carried it there and when I thought I had lost that I had the combination changed and the man who changed it gave me a piece of pasteboard that big which he wrote it on and I carried it in this pocket-book. In 1919 was the only time that I ordered the combination changed. That was all the work that I knew of at that time. I paid a bill for some work done on that safe in August or September, 1922, but I don't recollect it at this time.

I discovered that the bolts to the vault door were oiled about Tuesday before the fair opened. The fair opened on Monday, September 1st or 2d.

(Testimony of L. F. Reinhard.)

The Mr. Lamb that I mentioned was the caretaker and was superintendant and had charge of everything, but the man actually in charge of the store last year was Joe Rudersdorf who was under Lamb.

TESTIMONY OF W. J. HUDSON, FOR PLAINTIFF.

W. J. HUDSON, being called and sworn as a witness on behalf of the plaintiff, testified on direct examination as follows:

My name is W. J. Hudson. I am a police officer of Spokane and have been for ten years. I have the things called for in the supoena to Chief Turner which are produced. I took these myself out of the place and brought them to the police office where they have been ever since. They are in the same condition as when I took them except I took one apart. The one I hold in my hand was the door [54] into the office that came under the table. The boards in question were admitted in evidence as Exhibit 11. There was first attached to Exhibit 11 a 2 by 4 in its widest place which you have shown me which was on the inner side. A little more than the upper half of the 2 by 4 had a notch cut in it and this part of the exhibit rested on that notch and the other ran through a 2 by 4 that was like this that ran clear up to the ceiling and on through. The other end butted right up against here which was a part of the construction of the

(Testimony of W. J. Hudson.)

building. The 2 by 4 that I have here that was attached to Exhibit 11 was not a part of the construction of the building but was put in there. It stood back of the wall up against this 2 by 4 here; it was not on the office side; it was toward the south—the south end of the standard and outside of the office. The other 2 by 4 was on the inside of the office supposed to form the leg of the table. The panel is tongued and grooved stuff finished on one side and I think rough on the other. The grooved, the finished side was on the inside of the office and is the same as the other wood in the east wall of the office just sawed off and set in. The other piece which you show me is the inside covering under the table to hide the cut in these boards which looks like the leg of that table, but it was hid from the inside where it had been sawed off. The other end was already hidden. This piece was used here as a wedge to keep that tight so if anybody sitting at the table would happen to kick this it wouldn't rattle. You can see there at this time where the people put their feet and they had that so it wouldn't rattle and show it. This small smooth strip was used for a wedge as I have just explained. [55]

(The different pieces were marked Exhibits 11a, b, and c. The 2 by 4 11b, the piece on the inside that appeared to form the leg of the table 11c; the pieces used as a wedge were admitted in evidence marked Exhibits 11a, b, and c.)

(Testimony of W. J. Hudson.)

The door from the outside under the grand-stand had these cleats on the back of it screwed on the back side under the grand-stand. These two boards were the end pieces at the very lowest corner of the grand-stand. This is where the cutting was which was dobbed with white paint and earth to make it look as much as possible the same as the others, and this was held in place with just a long screw at the corner. The reason the other two boards were not cut was that it appeared that they were that way at the time of the construction of the grand-stand and could be taken out without sawing. It was only necessary to saw the end of one board. I discovered the outer door Sunday, following the close of the fair. I was there detailed to the case. There was with me one of the men employed by the Fair Association, Mr. Semple. Reinhard was there and Thompson went out with me. He was working inside the building. After I discovered the outside door I went to Mr. Elbick and told him that I thought I had found the outside door and we called Reinhard and Semple and they came and looked. And I told them if they would work the outside wall I would watch the inside of it and we would tap every inch of it and find where that was for the purpose of discovering the inside door. I went on the inside of the building where this inner trap-door was and started tapping at the corner and kept on and he said he thought he had found an entrance and that it was right in

(Testimony of W. J. Hudson.)

that [56] little corner and I went over with a big screw-driver and jambed it into the wood and the door slid right open. Between Friday morning, the 5th, and when I discovered these two doors, I had been in the auditor's office but had examined the inside part of the office and toilet and a few things like that and made an examination of the walls. I was not detailed on the case until Sunday morning. I was detailed at the fair all week but not on the case and with Reinhard once and a while we would go in there when we didn't have anything to do and fool around in the office. I made a casual inspection once and a while. I did not discover the inside door until I did the tapping. It was not visible or apparent to anyone just looking. The door in to the grand-stand was hinged with two leather straps and some little black screws in them. I brought some shavings in which I turned over to Chief Turner. I understand that the Chief turned them over to the city chemist to analize and supposed he would only use a part of them but in fact he used all. They have some more down there that Detective Hunt got. They are in his possession. Hunt was detailed on the case the next morning after the robbery—I think after we went out there. I don't know how he got them. I know the ones I took off the safe on the morning of the 24th I turned over to Chief Turner and he turned them over to the chemist to be assayed. They are all gone.

(Testimony of W. J. Hudson.)

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

Exhibit 11a was back of the inner wall and underneath the grand-stand. This groove here was cut and not used; it was at the south end of the cut. Nothing fit in that. They cut that to use it and didn't use it for some reason or other. That is, that groove alongside of Exhibit 11 had no purpose so far as we can see. The purpose of the indentation or [57] cut was simply to permit the boards to slide in at that point and hit it. It is in the same condition now as when I first saw it. The cuts were new and they had dobbed it with some kind of a paint mixed with dirt to make it look old. On the inside part of the building the 2x4 that they went alongside of where they started through at the very top showed the mark—it looked like it might have been a punch or something like that—a punch or maybe a nail driven through at the top part. The first board on which they started through was cut with a hack-saw which was very fine, and the rest was cut with a key-hole saw which run off; I didn't find a hole in the door but on the 2x4 in the building which shows a mark of something going through there; it looks like it might have been a nail or a punch but it doesn't look to me like an auger. This 2x4 would be outside of the auditor's office. The ends of these boards look a little older than when I first examined them. The one that looks very old is caused by grease. This door was greased on the bottom so it would slide easy.

(Testimony of W. J. Hudson.)

Another board which had been identified by the witness on direct examination was marked Exhibit 12. All these boards in the hole in the grandstand were very old and the ends of all three are the same as when I found them and they all appear to be very old cuts except the one, and as to that board it appeared to be a very old cut at one end and the other end it appeared to be somewhat recent and as though there was some white paint on it. I attempted to find out where the paint came from. [58] I found white paint on the fairground which showed it had been used and I found this in the storeroom. Prior to Sunday I was not on the job at all. I was not detailed to the case until the fair closed. Prior to that I was at the fair-ground on behalf of the police department but was detailed at other work. On Sunday there was with me Officer Thompson.

TESTIMONY OF CHARLES LAMB, FOR PLAINTIFF.

CHARLES LAMB, called and sworn as a witness on behalf of the plaintiff, testified, on direct examination, as follows:

My name is Charles Lamb. I reside at Spokane and am superintendent of the fair-grounds and have been such for twelve years. After the robbery I noticed the oil on the vault door. My attention was called to it by Mr. Randall. I had not put it

(Testimony of Charles Lamb.)

there nor delegated nor authorized anyone to do it. If it had been oiled by anyone in connection with the Fair Association I expect that it would have been mine.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

I first noticed the oil on Sunday about noon. I had never oiled the mechanism of the safe. The Fair Association had quite a number of employees out there. I don't think they could get in the vault. We made it a practice to keep it closed. During the interim between fairs the vault door would be opened only when I went in or someone from the office went in.

TESTIMONY OF E. A. LARSON, FOR PLAINTIFF.

E. A. LARSON, called and sworn as a witness on behalf of the plaintiff, testified, on direct examination, as follows: [59]

My name is E. A. Larson. I live at Spokane and am at present a student at Whitman College at Walla Walla. I am a senior there. I have been there four years and graduate this year. During vacations I work for Duncan Electric and Norris Safe and Lock Company. I worked for C. L. Corey when I was in high school and Mr. Duncan. That is all the experience I have had with reference to safes. I have had considerable experience in

(Testimony of E. A. Larson.)

opening safes, in changing combinations and so on. In the month of September, 1922, I was called up from the office of the Fair Association to go out and open the safe of the company. I was then in the office of Norris Safe and Lock Company. Mr. Chick was manager of that company. He was not in town at the time. I think it was Mr. Hannan or Hanna or someone of that name that called me. He told me to go to the Fair—see the caretaker to let me in and open the safe in the vault. I had to see the caretaker to get the vault door opened. I went out, saw the caretaker. He let me into the vault. I wouldn't know that caretaker. He let me in all right. There was nothing the matter with the safe. The combination had been lost. They wanted it opened so they could use it that year. I drilled a small hole to the west of the combination about 3/16ths of an inch in diameter and opened the safe. By drilling a hole and getting a wire in there you can pick up the tumblers and thereby line it up and open the safe. You just line up the tumblers and then draw the bolts. I did not know what the combination was. Whenever you drill that hole in there you can get it at that time whatever the combination is. I drilled right through here, say, 25 numbers. That is divided into 100 numbers so 25 shows down here or at a line drawn horizontally through the center of the dial. [60] And by drilling under this ring here I was able

(Testimony of E. A. Larson.)

to open it. I then returned to the office and secured a new dial rim and a plug and returned to the Fair. I then plugged the hole and placed a new dial rim in position and set up the combination and returned to the office. It is customary to open safes in this way. I have done it frequently and I always afterwards plug the hole and I did that in the usual manner. I couldn't say that the hole was exactly 3/16ths inch. Generally we keep a stock of plugs. You can buy them at a hardware—tapered steel plugs. I went down to the shop and I got the length of one of these plugs and cut it off at the right place and drove it in so it was tight, fairly tight. Ordinarily if the plug is in a conspicuous place and not covered by the dial rim we generally countersink them and put filler in there and paint that over so you can't notice it. In this particular case it was covered by the dial rim so I didn't do that. After putting the plug in in this manner it ordinarily could not be gotten out without drilling it out—redrilling it in that place, or it would be possible to pull it out by a screw extraction or drilling into the plug in the seat of it and turning it out; that is, you would drill a hole in the plug and get hold like you get hold of a cork in a bottle and yank it out; otherwise you would drill it out the same as you would drill the original hole. There is a definite place to drill such holes. Ordinarily on this type of a Hall safe they ordinarily drill at the top of the combination. If you start

(Testimony of E. A. Larson.)

out as far as I did you generally start your drill slanting a little at that point in the middle there—slanting so you will hit the outside edge of the carrier tumbler. On this particular occasion I can't say whether my drill hit the carrier tumbler. [61] I imagine it did where it started through. It might do so. If a mark had been made by my drill on the carrier tumbler it would depend upon whether conditions—whether it would be bright or not. It would be corroded, no doubt, to an extent. It might corrode; I couldn't say as to that. I would think it would get darker and nearer the color of the other metal. In order to take the dial rim off it is necessary to take the tumblers out of the back and pull the key out and remove the carrier tumbler and that removes the dial and spindle. When this is removed there are two screws, I think, that hold the dial rim and it can be taken off and a new one put in its place. I imagine any local concern would sell you a dial rim. Some of them have them in stock. If I have damaged the dial rim in any way I always replace it after I have drilled the hole.

(Witness temporarily excused to be called later for cross-examination.)

TESTIMONY OF C. L. COREY, FOR PLAINTIFF.

C. L. COREY, called and sworn as a witness on behalf of the plaintiff, testified, on direct examination, as follows:

My name is C. L. Corey. I reside at Spokane and am a safe and lock expert. Have been in Spokane possibly 20 years and have a place of business here. I was called to the fair-grounds last fall concerning the safe. I was out there 2 or 3 days. I was there the Sunday following the robbery and there was a part of the police force, detective force and a representative of the Burns Detective Agency, Mr. Toyer, Mr. Bolt and myself. I did not then make a detailed examination of the safe because it was the concensus of opinion there was nothing the matter with it, so I didn't go through it. [62] I was next there about the 24th. Mr. Kizer, Mr. Semple and Mr. Reinhard came down to the shop and asked me if I had made a detailed examination of the safe and I had to say that I did not, so I rather reluntantly went out with them and we looked the vault over and the safe and at that time I went into it more thoroughly by taking the entire lock out—the lock, keys, carrier tumbler, the dial and the dial rim. The first unusual thing I discovered was that I discovered a drill-mark on the carrier tumbler. I didn't examine that very thoroughly as far as its being fresh or not. I can't state exactly what condition it was in. Then by

(Testimony of C. L. Corey.)

taking the dial out after removing the carrier tumbler I took two screws out of the dial rim and after removing the screws the dial rim did not fall off; I had to pick it off from the top with my fingernails to get it out. That would indicate that the dial rim had been put on there some time before and there was also shavings come out with it underneath the dial rim. Mr. Kizer was in the vault at the time and I told him what I discovered and showed him and he rushed out and got Mr. Reinhard and Mr. Semple and they together called the authorities and waited there some time until they all got out there.

We didn't do anything more with the safe until I discovered the hole. The hole was drilled at what they got out there. I discovered the drilled hole before they came out. After I removed the dial rim we called 9 o'clock or 90 degrees to the left of the center. The hole was approximately—I think I measured that—it is a quarter of an inch hole and the hole led directly into the combination lock and permitted a wire or pick, as we call it, to slide in behind the tumbler, and by turning the dial the door could be unlocked. [63] That is the purpose of the hole. That is the usual way of doing it—either there or at zero. The drill rim did not show any evidences of having been subjected to the drill. The drill had went through the safe itself which was called boiler plate steel. The shavings I found were brass and steel. The drill rim is made of brass. Anyone understands the safe or drill in this

(Testimony of C. L. Corey.)

same place, whether safe expert or yeggman. After finding the hole they notified the authorities, the Chief of Police and the Chief of Detectives and a few more of the detectives out there—I think, Detective Hudson and I can't recall the other fellow, and they came out in time and we did nothing until they got there, and we showed them what we had found. They gathered up some of the shavings and took them away. The following day we gathered up a part of the shavings that was on the floor and on the pedestal that held the safe. We got both steel and brass shavings in what we took and the police got the same. The mark on the carrier tumbler is slightly discolored from what I have seen it before. It would naturally oxidize or discolor. The extent would depend upon how it was protected. Where a plug was put in a drill hole you could drill it out easily or you could drill a small hole in and run a tap in. In putting in a screw in that tap and pulling it out you would have to drill. Following the first method you would drill just the same as if the plug was not there—the same as the original hole. You can drill in part way and afterward the plug will get so it will turn round. Brass oxidizes slower than iron or steel.

On cross-examination by Mr. WILLIAMS, the witness testified as follows: [64]

The material which you hold in your hand is a combination; it is a lock but works by combination —more difficult to open than the ordinary lock where one is not familiar with the combination.

(Testimony of C. L. Corey.)

The combination can be changed any time by the removal of those screws and putting them at different places. When a hole is drilled like this one you get inside the combination the case holds the combination lock. The drilled hole let you only into the combination chamber. Further on is the covering of the combination chamber and if that covering is removed it lets you in to the interior of the safe. The only office which this hole could perform would be to permit a wire or piece of steel to be inserted into these different slots. When you get the tumblers lined up it allows the fence of the lock to pass into the combination. The fence is this flat piece of steel that goes from the knob back into the combination chamber. The small slots in the master tumber are to prevent turning the dial when there is pressure applied against the combination. The fence will drop into one of these slots and turn itself. The purpose is to prevent one not familiar with the combination from acquiring the knowledge of the combination by listening to the tumblers or by the pressure of the fence against the master tumbler. The little abrasion on wearing at the edge of the master tumbler in my mind was a burr on there when it was stamped out and it was filed off to make it smooth. It is something that has existed from the time the safe was assembled and put out. It still looks bright. The oxidization of brass or copper is a very slow process and particularly when the metal is enclosed in a case such as the combination on this

(Testimony of C. L. Corey.)

safe. The presence of moisture would have its affect on it. Looking with the naked eye these filings [65] marks which I referred to look quite bright. At your request I have looked through the glass at the mark which I thought was a drill mark this morning and it still looks quite bright, notwithstanding it is nine months or thereabouts since I first saw it. Through the glass I noticed two or three dark spots on the drill mark. There could be nothing run against it after the drill went in. If some metal bruised it or struck that point it would show evidence of a mark. If it was scratched in some kind of a way it would show under the magnifying-glass. Brass scratches easily. The dark marks I would say was where it oxidized; it attacked that part first—discolored first. I do not think scratches would produce that appearance. On brass the smallest abrasion or the point of a drill mark would be attacked first before the screw part would. If the one who had drilled that hole in the beginning without shifting the combination put in his steel for the purpose of picking up the carrier tumbler or the different tumblers this piece of steel would come in contact with exactly that point. If the steel was put in after the combination had been worked on or changed it would be very much the purest of accident and a very unusual accident if it should strike the same place. A tapered steel plug is a piece of roll steel that is tapered has the big part of the taper about the same size as the drill hole. The outer steel part of this safe

(Testimony of C. L. Corey.)

was approximately half an inch thick. The drill also went through into the combination chamber beyond the drill hole about an inch or an inch and a quarter in length. There are at least three ways of removing a plug in such a hole. One way is to drill it out and in that event after you drill in to where the tapering [66] commenced then the plug starts to turn and is usually withdrawn with the drill. If the drill is of the same size as the plug as it turns round cutting in this metal it is removing steel all the time that the drill turns, and whenever the drill slides under the steel to cut it and it starts to turn you will remove it, pull the plug out with the drill. The affect of that action is that it forces the drill to one side in the hole and the drill starts to cut the wall of the hole and one way would be if the drill is removed without bringing the plug out you would simply drive the plug on through into the combination box. Another way of removing the plug is a very easy one of taking out your combination and just giving your plug a little bit of a tap on the inside and it goes out. It would go out easily that way. The resistance ceases very quickly after the first tap, and with this second method there are no shavings results from that at all. The third method you use a smaller drill and you drill in deep enough to put a tap into it, to put screws into it or threads, and it will usually pull the plug. You have to exert some pulling power from the outside, just pulling on it. The tap turns it and the tap is threaded right

(Testimony of C. L. Corey.)

in. That is not such a difficult job. In that character of an operation the amount of steel shavings that comes from the boring is small. The shavings from this drilled hole would about fill a teaspoon level full. When I found the hole on the 24th I found no evidence of a plug or any part of a plug. The drill—if it was drilling on the plug—would not have drilled out of the plug if it was tapered. He might drill in a small hole clear through. It would have to be a very small size drill. I found no remains of the plug in the hole and no remains of the plug in the combination nor on the [67] outside. The hole is not clean cut on the outside. It would be possibly another drill went through there, because the hole is not true—it is not a perfect circle. Looking through the hole now it follows an exact line throughout. It looks all right there, but in front it does not; it might be possible a second hole went through there. If the dial of the combination was in place with the rim in place there would be no way for anyone, without removing the rim, to know the size of the drill that had been previously used. There are various sizes of drills. Looking through the hole I see no evidences of any remains of a plug on the side. I see no evidences of a drill having sheered off when it came to the point where the taper began. Apparently the walls of that hole have not been destroyed in anyway. Knowing that the hole had been drilled there and it was attempted to drill it at 9 o'clock I probably could not once in a million times exactly center the plug; I

(Testimony of C. L. Corey.)

could come awfully close to it. I am now referring to when the dial rim is on. If I did not exactly center the plug it would show. It would not be possible, probably once in a great many times, if the dial rim was removed, and I saw the plug and had the same size of drill to exactly center the plug and drive the hole on exactly the same angle, and it would be practically impossible to follow exactly the same line. If the dial was removed and I could see what was under the dial I could drill it out so as to not show any evidences of it. I would first center the plug, drill it in and tap it and pull it out, never hitting the walls of the old hole; I would use a smaller drill. I wouldn't attempt to use the same size of drill. If I was trying to drill the safe and did not know that there was a hole there that had [68] been plugged and ran my drill through the dial rim I would learn that there was a plug there just as soon as I got through the dial rim. It would discover itself because after drilling through the dial rim in order to get the hole center where you want it you would have to punch the steel on the inside, that is, when you would discover there was a plug in there before you ran the drill. That has the effect of keeping the drill going in straight. There is no possibility of drilling that hole or drilling such plug if the door is closed without boring the dial rim, go through the dial rim—clear through it. If a burglar were intending to get inside of that safe by drilling a hole through there and

(Testimony of C. L. Corey.)

wanted to leave it in the same situation or condition after drilling the hole it would be necessary, after the drilling was completed, to then take out the combination and take out the carrier tumbler, take off the dial, and he would have to be supplied with a new rim. He would need the dial rim. All dial rims are not the same. The Hall safes are different. It would take me about 5 minutes to get the combination of this safe if the door was open and the combination box in place. It is a very easy procedure. You use a piece of steel through this slot in lining up the tumblers. When I saw the shavings on the 24th they were scattered on the top of the pedestal that supports the safe and some on the floor. They were mixed up with the dust and business papers and rubbish and one thing and another. There was considerable dust and dirt on the pedestal. I think it was Hudson who first discovered them; I am not sure about that; I had not discovered them then—I had not looked for them. I had made [69] an examination of the premises on Sunday following the close of the fair. I don't know where these shavings came from unless they came from the second drilling. I don't know but what maybe someone put them there. They covered a space of about a couple of feet maybe. I don't think the shavings extended over as far as the sides of the safe; I would not be sure about that. I did not see any scale weights or ticket trays. Where you drill a hole such as this in a safe door the steel does not drop straight

(Testimony of C. L. Corey.)

down; it scatters all over dropping on the floor. The faster the drill is moving the farther it throws it. It depends a great deal on the momentum. We picked up some of these steel shavings; they were not in a bunch but were scattered. I didn't notice any particular place where they seemed to be in quite profusion; I had never noticed them there before. My idea was when I went out there that I was going to take everything off the safe—going to take everything out of the safe and satisfy myself that it was all right. I did not know at that time that this safe had been previously drilled. I did not know anything about any work done on the safe in August or September 1922. Noboby suggested taking out the combination. I may have forgotten to take my tools out. I was down to my shop working when the gentlemen drove down and picked me up and I thought I would go out and look it over again. The principal purpose of going out was to see if I could find some mark on the safe showing forceable entrance. When I removed the screws that held the dial rim the rim did not follow and it was that that indicated to me that the rim had been on there some time—been on some little time anyhow. [70] If this had been a recent rim placed on at that place you would expect it to follow immediately. The reason would be the sticking of the paint or enamel, or two bodies kind of coming together in a way. Where the thing has been on a long time the tendency is to stick. I couldn't say how long it had been on. There were no marks on the dial rim.

(Testimony of C. L. Corey.)

On redirect examination by Mr. GRAVES, the witness testified as follows:

When the dial rim was taken off some filings fell out. These could not have fallen out except the dial rim was taken off and the lock taken out. These shavings could have been inside where the plug was in. These shavings in there, wherever they came from, were made either in taking the plug out or after the plug was out. The hole is a scant quarter of an inch. I have just measured it and it lacks 1/64th of being a quarter of an inch. If I attempted to burglarize the safe the place where I drilled would be the same as if I was employed to open it. When I went through the rim I would at once discover the plug. From then on I would know of its existence. I could not see the plug and drill with reference to the plug precisely the same as though I had previously known it was there. A burglar would not have to know anything about it having been there before. In order to drive the plug out you would have to first open the safe door and take out the plug; otherwise the dial rim would stop it coming out. Then you could punch the plug out—drive it out. With the safe door closed it could not be driven out. It would have to be drilled out in one of the ways I mentioned. The carrier tumbler looks to me as though it was only hit by the drill once. The drill mark on the carrier tumbler could be made here by the one who originally drilled the hole or some one drilling out the plug. It ought to show a difference in oxidiza-

(Testimony of C. L. Corey.)

tion,—in two years, seven or eight [71] months it would be very different. The carrier tumbler shows much brighter than the rest. I have a similar carrier tumbler of the same material on which I have put some marks within the last two days. (Witness produced a carrier tumbler.) These are the marks right here.

(Carrier tumbler admitted in evidence marked Exhibit 12.)

I would say there is considerable difference in the brightness of the marks on Exhibit 13 and on the carrier tumbler of the safe. It would be my idea that this could come from the oxidization of the wound on the safe tumbler. I would not want to *take* how long that would take. If the plug was driven out it would not hit the carrier tumbler.

On cross-examination by Mr. WILLIAMS, the witness testified as follows:

Referring to the suggestions made by Mr. Graves in his redirect examination I know that that dial rim was not and could not be in place on that safe at the time that drill hole was made or if there was a plug there at the time the plug was put in. There is a very easy explanation as to how the shavings got in the dial rim which is, there is a certain amount of shavings that are left in the hole after you drill it and after the dial rim is put on on the slamming of the door back and forth would cause the shavings to drop out from in front down into the dial rim. These shavings would rest down in the edge of the rim—the ones which might be jarred back

(Testimony of C. L. Corey.)

into the dial rim by the slamming of the door would be inside of the hole. If that hole was drilled by Mr. Larson in 1922 and a plug was put in there, there couldn't be any shavings, and if the plug was put in there and driven out from the inside there couldn't be any shavings there and if a smaller hole was used to bore into the plug [72] and they in that way extracted the plug, "well, there may have been some shavings in behind the plug; they would have to be very far in. This plug, as a usual thing, is only a short one."

Q. And in the course of two years from the time Mr. Larson drilled this hole in 1922, if there were any loose shavings there they would be jarred loose if they were jarable?

A. If the plug was in there they couldn't get out.

Q. Not if the plug came in contact with them, that is quite true. If the plug came in contact with these and you knew absolutely—at least you know so far as you could know at all—that that plug, if there was a plug there—that that plug has never been drilled out clear through with the same size drill.

A. I don't think so. A tapered steel plug put in fairly tight could not be driven on through without injuring the lock. It would come in contact with the tumbler and fence and the key itself. It could be driven out.

I said that the mark on the carrier tumbler on this safe could only be made in one of two ways. One by Larson when he drilled the safe in 1922, or,

(Testimony of C. L. Corey.)

perchance, by the one who drilled out the plug, if he did drill out the plug. It could be done in other ways; if you wanted to it could be taken out of the safe and laid down on some object and the mark drilled. What I referred to were possibilities that could have happened in this case. The size of the drilling on Exhibit 13 enables me to see a little bit better as to brightness than on the other tumbler. It would probably show up brighter on this tumbler if the drill mark was larger. [73]

TESTIMONY OF E. A. LARSON, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

E. A. LARSON, on cross-examination by Mr. WILLIAMS, testified as follows:

It was sometime about the last of August—three or four days before the fair would open in 1922, when I was called to open the safe. The stenographer of Norris Safe & Lock Company took the order and I do not recall that I got into communication with the fair officials. I went out and met the caretaker who instructed me what to do. This was not Mr. Lamb. There were two or three other men in the office who were cleaning up. The caretaker opened the vault and let me in. As I remember it, he did this by operating the combination. I did no work on the combination. The instructions was to see the caretaker and open the small safe in the vault—that the combination had been lost. The safe seemed to be in perfect working condition. I might have started to drill at the zero point at

(Testimony of E. A. Larson.)

the top outside of the dial rim and would not go through the dial rim at all. If you are in a position to have an extra dial rim it is easier to drill where I did. Otherwise you drill at the top and don't destroy the dial rim. Drilling at the place I did there is no way of avoiding spoiling the dial rim. You might bend them up and drill under but the dial rim is ruined; it could not be concealed that it had been mutilated or bent. The dial rim now on this safe has not been mutilated in any way. The caretaker was in and out while I was doing this work, and when I went down town I left the safe open; the parts were out at that time. I did not have a new dial rim with me. Down town I got a new dial rim and a steel plug. This was a tapered plug —a small piece of cold roll steel about the size of the hole, maybe, a little less than an inch in length. It tapered all the way. [74] It would depend entirely on how hard it was driven as to whether it is pressing against the wall of the hole except at the outer edge of the plug. I drove it in until it was flush as I recall it. It drove in fairly easy but was quite tight—fairly tight. I did not attempt to drive it in particularly solid. I drove it in to a place where it was flush. Even if I had attempted to drive it in particularly hard it would be a very small point at the outer edge where it would be pressing against the wall of the hole. I put in the plug up and—the dial rim and I can't recall whether I left the safe locked or unlocked. The parts were out at the time I went down town after the dial rim.

(Testimony of E. A. Larson.)

I don't remember whether I changed the combination. I reported to no one outside the caretaker that I was through. Three of them called at the office a day or so later for the combination. I do not know any of these parties outside that Mr. Hannan was one of them. I couldn't say who the gentleman was I delivered the combination to. I had it written out and delivered that paper at that time. I couldn't say whether Mr. Griffith, Mr. Semple or Mr. Reinhard was there. This was after I was through with the work. I had several drills with me. I did not look to see what size I chose for the work. It might have been smaller or larger than a 3/16ths. I probably hit the carrier tumbler in drilling the hole; you would naturally strike it. If a tapered plug was driven in and was then being bored out from a hole like this it would be possible for the drill to come in contact with the carrier tumbler if you drilled a smaller hole than the plug and the plug stayed intact. That would have to be done with a smaller drill. If you were drilling the same size hole after you [75] drilled past the place where the tapered steel plug fitted the edge of the hole the plug would become loose at that point and it would tend to spin and the drill might slip off. If the pressure of the drill should force the plug through the plug would be between you and the carrier tumbler, so the drill could not come in contact with it until it was drilled out.

TESTIMONY OF C. L. COREY, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION.)

C. L. COREY, on further cross-examination by Mr. WILLIAMS, testified as follow:

If a plug is being drilled out it would not strike the carrier tumbler.

Q. Then you know, do you not, absolutely, that if there was a plug in that hole and someone was drilling it out that that mark on the tumbler would not be made by that drill?

A. No, the drill would not go in that far.

TESTIMONY OF ROSE W. BROWN, FOR PLAINTIFF.

ROSE W. BROWN, called and sworn as a witness on behalf of plaintiff testified, on direct examination, as follows:

My name is Rose W. Brown. I have been a stenographer for Randall & Danskin for 2½ years and on October 17th I typewrote that letter from the dictation of Mr. Randall and enclosed in the letter the proof of loss in this case to the Fidelity & Deposit Company.

(It was admitted that they were received within the time fixed by the policy.)

(Letters admitted in evidence marked Exhibit 15:

We received that letter in reply dated October 23, 1924 and the proofs of loss were returned. [76]

(Testimony of James A. Williams.)

(Letters admitted in evidence marked Exhibit 15: Letter of October 27, 1924, signed "Spokane Interstate Fair"; answer of October 28, 1924, admitted in evidence as Exhibit 16; letter from Randall & Danskin and Graves, Kizer & Graves addressed to Mr. Williams of October 29, 1924, admitted in evidence as Exhibit 17; letter from Mr. Williams of October 29, 1924, admitted in evidence as Exhibit 18; letter to Fidelity & Deposit Company signed by attorneys for plaintiff of October 30, 1924, admitted in evidence as Exhibit 19; letter of November 10, 1924, from defendant to Graves, Kizer & Graves admitted in evidence as Exhibit 20; letter from Mr. Williams to Graves, Kizer & Graves of November 14, 1924, admitted in evidence as Exhibit 21.)

TESTIMONY OF JAMES A. WILLIAMS, FOR PLAINTIFF.

JAMES A. WILLIAMS, called and sworn as a witness on behalf of plaintiff testified, on direct examination, as follows:

I saw all the correspondence with the Fidelity & Deposit Company in due course. I can't say that the letters you have introduced are all between you and the company upon that subject or between me and your firm. I couldn't say without checking; I haven't made a check. [77]

TESTIMONY OF C. L. COREY, FOR PLAINTIFF (RECALLED—REDIRECT EXAMINATION).

On redirect examination by Mr. GRAVES, C. L. COREY testified as follows:

When I was out there Sunday morning or at a later date I examined the vault door. The upper bar that is connected with the main draw bar was disconnected leaving the balance of the bolts operating except the top one, and by closing the door we noticed that the door was sprung in such a way that the top bolt would not go into its recess in the proper way which would cause a noise if it was opened—cause considerable noise because the top of the door had to be forced in in order to close it, and by cutting off that bolt or taking out the screw that operated that bolt that would prevent that bolt from acting and would stop that noise. The tape on the bolt was common friction tape commonly used with electric work. It was put around the bolt to prevent the other bolt from clanging against it and making a noise. The tape was fresh; I wouldn't want to say how long it had been on there but tape that has been on a year or more would be so dry that it would not stick. This was sticky when you put your fingers on it; it was fresh tape.

I did not look at the combination of the vault. If it is a two combination it could possibly be read by anyone that understood reading lock combinations in 25 or 30 minutes. If it was a four it would take you several years—maybe longer than that.

(Testimony of C. L. Corey.)

On recross-examination by Mr. WILLIAMS, the witness testified as follows: [78]

If the screw had been in this bolt to the vault there would have been some difficulty in closing the door. The top of the door was slightly sprung out and there had to be enough pressure exerted in some way or other when the door was closed so as to pull that in. When the screw was removed that difficulty was removed. If there are only two tumblers there are comparatively few varieties of combination; you have the tumbler and the carrier tumbler. The last number can be easily determined without any guesswork. That leaves you only one to go around the circumference—one to 100 to get the other number. As the number of tumblers increases they multiply into the thousands and hundreds of thousands, and when you get quite a number of them they practically cannot be figured. With either the safe or the vault door it is easy to get the combination if the door happens to be open.

On redirect examination by Mr. GRAVES, the witness testified as follows:

Taking the combination which you show me—two tumblers and the carrier tumbler—one who understood it might read the combination from the outside anywhere from one hour's time to a day or two. On a Yale combination on a vault door it is a usual thing to set them on numbers of 5, 10, 15 and 20, or 15, 25, 35 and so on; they are not set on odd numbers so that it is easy to pick the combination

(Testimony of C. L. Corey.)

on a vault door as a usual thing. This one, I believe, was set on odd numbers—well, that is, 60, 10, 93. 93 is the carrier tumbler; they could tell that. That would be very easy to pick. An expert ought to get that in an hour's time easily. [79]

On recross-examination by Mr. WILLIAMS, the witness testified as follows:

In the combination that Mr. Graves showed me in the book there is one tumbler more in the vault than in the safe. In the vault there is five with the carrier tumbler.

In answer to Mr. Graves' question I was proceeding on the theory that two of them were together—worked together, with the result that it was the equivalent of a 3-tumbler combination. The vault would have one tumbler less operating than the safe. It had a dial in connection with it of 100 numbers. I could open it in from an hour to a day. I would start on multiples of 5, 10, 15, etc., then start from 10, 30, 40 and 60. 60 is the first number on this one. If that don't open it well I could drill and open it. If the combination was set on numbers other than 10, 20 or 30 that would make it harder and more difficult. If the numbers were 73, 19, 3, that would have taken a great deal longer. It is hard to tell how long—hard to estimate it. The reason for my remark a while ago about setting it on 5's and 10's that is the customary way on vault doors which is not the customary way on safe doors. If they did not follow the custom it would be harder to open. As to the number given by

(Testimony of C. L. Corey.)

Mr. Graves not set on 10 or 5 you can determine that without testing for it. If it just happened to have been the case that it was an odd number on these other two you probably would spend many days before you could open it.

Q. In other words the question of how someone could open it from the outside would depend a great deal upon good luck and things of that sort.

A. Outside of drilling for it. [80]

On redirect examination by Mr. GRAVES, the witness testified as follows:

If the numbers of the safe were 4–7–86–49, I could possibly, without drilling for it, open it in a day.

TESTIMONY OF L. F. REINHARD, FOR PLAINTIFF (RECALLED—REDIRECT EXAMINATION).

L. F. REINHARD, recalled as a witness on redirect examination by Mr. GRAVES, testified as follows:

Since testifying as to the numbers on which the vault was set I have gone and secured the combination. That was not the combination of the vault at the time of the robbery. I said there was—first said two tumblers and then I said I wasn't sure. I said about three or four tumblers combination on the vault door but that my book would show it. Now, when this combination was changed it was changed to different numbers but the same number

(Testimony of L. F. Reinhard.)

of tumblers. On the vault door I found three numbers to open it; that is what you call a 3-tumbler combination and the safe was four. At the time of the robbery there was three numbers on the vault. It is not these three which you show me. I have not got that combination; it has been destroyed and I do not remember it.

(The safe and lock in controversy were admitted in evidence and marked Exhibit 22.)

Plaintiff rests.

Mr. WILLIAMS.—I move to withdraw from the consideration of the jury the testimony given by Mr. Corey concerning the time in which the combination of the vault door could be opened with certain numbers that were submitted by Mr. Graves as it later developed that these numbers were not the numbers of the vault at all.

Mr. GRAVES.—I haven't the slightest objection.

[81]

The COURT.—The motion will be granted and said evidence stricken.

DEFENDANT'S CASE.

TESTIMONY OF WESLEY TURNER, FOR DEFENDANT.

WESLEY TURNER, called and sworn as a witness on behalf of defendant testified, or direct examination, as follows:

My name is Wesley Turner and am and was on September 4th and 5th last Chief of Police of the City of Spokane. On the morning of September 5th

(Testimony of Wesley Turner.)

I visited the fair-ground in connection with this money lost. I went out with the driver and arrived about 8 or 9 o'clock on the morning of the 5th. There was already on the scene Detectives Hunt and Self and Mr. Jordan and there might have been one or two others. These officers I have mentioned were connected with the police department of this city—Hunt and Self, members of the detective division and Jordan in charge of the identification work; that has to do with finger-prints and things of that sort. As I remember it I spent most of the day out there. I made several visits. On subsequent days I went out and made investigation. I don't know that I can give the exact dates; I made a number of trips prior to September 24th.

I have specialized in the identification branch in criminal or police work. I had charge of that work for some twelve years prior to becoming chief. On the morning of September 5th Capt. Burns told me he had assigned two men to the case. When I arrived there I went directly to the office and I believe I met one of our officers in the office and I proceeded with him to the vault. Jordan and Hunt, were, I believe, in the vault at that time. I stayed [82] there a few minutes. I tried to assist Jordan in his investigation of the safe,—that is, I looked the safe over and examined several articles with a magnifying-glass with a view of finding finger-prints. I was looking at a small iron roller—I don't know whether it would be a

(Testimony of Wesley Turner.)

ticket roller or just what the purpose of it was. Jordan has it here.

(Instrument marked Exhibit 23 for Identification.)

Exhibit 23, for Identification, is, I think, the instrument that I examined under a magnifying-glass.

(Exhibit for Identification 23 admitted in evidence.)

When I first saw Exhibit 23 Jordan had it in his hand and on my entrance into the vault, and after I spoke to him he handed it to me together with the magnifying-glass and I examined it for finger-prints. When I handed it back to him I think he set it back underneath the safe—the edge of it. The safe sit up on a sort of a little stand and I believe that the stand extends out just a short ways, and he put it directly under the front—there towards the front. I can't say whether it extended out in front of the safe. I consumed but a few minutes making this examination with a magnifying glass. I was looking for finger-prints. If there had been any steel shavings on this tray I think I would have seen them. I am satisfied there were none—no steel shavings on it. I looked over the surface on both sides for finger-prints. It was not kept flat; I turned it around in my hand and looked at the edge different directions and held it up to the light.

I was out to the fair-ground on September 24th when this drilled hole was found. This Exhibit 23 was still there at that time. I saw it. I did

(Testimony of Wesley Turner.)

not pick it up and look at it. There were a number of steel shavings on it at the time. [83] I could see them all right and would not need a magnifying-glass. On September 5th there were a number of articles under the safe that I examined. There were a number of large buttons that they wear on their coats out there at the fair. I picked up several of these and looked at them and I believe there were some papers and a number of different things,—I don't remember all of them. I didn't see any steel shavings on any of them. If they had been there I probably would have seen them. I couldn't say whether those buttons were still there on September 24th. If there had been any steel shavings scattered around there on the stand on which this safe was resting I think would have attracted my attention. If I had found anything of that sort I would have tried to find out where they came from. I did not discover the presence of any steel shavings on that day or on any of those subsequent times until September 24th. I went to the fair-ground on the afternoon of the 24th when Mr. Semple called me. Mr. Kizer, Mr. Semple, Mr. Reinhard and Mr. Corey were there I went out with Capt. Burns and Detective Hudson and I believe there were one or two more already out there. After going on the ground that day I discovered the steel shavings. Capt. Burns and Detective Hudson preceded me into the vault. Mr. Reinhard stopped me to talk for a minute and after exchanging a word or two with him I stepped in.

(Testimony of Wesley Turner.)

The men were gathered around in front of the safe and I believe that Mr. Corey was explaining how he happened to find this hole and I stepped up to this little circle of men around the safe and looked over Detective Hudson's shoulder. I glanced at the safe and I noticed the shavings at that time. My eyes were only just a few feet away; I don't think it was four feet—four or five. I hadn't heard of the shavings being [84] discovered before them. I had no difficulty in seeing them. They were present along in front of the safe on this little shelf and as I stepped back I noticed them on the floor. As soon as I discovered the shavings I touched Detective Hudson on the shoulder and asked him to step outside.

We were there on September 24th fifteen or twenty minutes, I should judge. I don't think any peculiar lighting effect was necessary in order to see the shavings. During all the time I was there I could see them easy. I noticed no peculiar lighting effect at that time. When I examined the premises between the 5th and 24th I did not devote any great deal of time to the interior of the vault; I simply glanced at the walls and examined the small safe pretty thoroughly. I discovered no marks at all in the vault-room. When I made the examination on September 5th there was a single electric light in the vault. I may have used a flashlight, Mr. Jordan carried one in his outfit. Outside of that I did not use any light other than was in the vault.

(Testimony of Wesley Turner.)

On cross-examination by Mr. GRAVES, the witness testified as follows:

I don't believe I would be able to state the exact time I was there on the morning of September 5th; it might have been 35 minutes or it might have been an hour. During that time I was in the vault with the officers for a while and afterwards I went out and talked with some of the officers of the fair. I probably talked to the different members of my force that were out there. I looked around the vault, examined the safe; I looked around the office and a little bit at the different doors, openings. I believe that is all. I was back again that day—I think in the afternoon. [85] I was at the police headquarters at the fair-grounds and was in and out of the office. I probably made a little further examination there in the vault and then I was in the office used by the fair management for a while. I did nothing else. I just sat and remained there. I was out again later in the day. I made several trips out there that day; it may have been three or possibly four. I don't think after this first time that I made much further examination on that day. Probably the only examination was in the morning. I believe I was out again Saturday and out again Monday; I wouldn't be sure about Monday. On Saturday I did pretty near the same as I did on Friday. I think I was in the vault that day with one of the members of the prosecuting attorney's office, and I talked with the different men standing about out there. I don't recall that I made any

(Testimony of Wesley Turner.)

special examination. I went out Sunday, the day that the trap door was found, and I examined these doors and was under the grand-stand on the race-track. I think that is all. I wouldn't be positive I was out there Monday. I was out after that time and before the 24th. I can't give you the exact date. I believe I was out there two or three times. I went out with different members of the prosecuting attorney's office and at one time with a private investigator. I did nothing special, just accompanied them on their trips. I did not make any further investigation. Probably all of the first-hand information I got was on Friday and Sunday. I don't recall that I obtained anything special at any other times. On Friday and Sunday I made no special investigation of the office; I was in there and kind of looked over the walls. I don't mean that I went up and felt of them. I stood around in there, glanced at them, kind of examined them. [86] On Saturday I did nothing further or special except that I had my eye out for any place that might have been entered. Prior to Hudson calling me out I did not know anything about the doors to get into the office that he had discovered. I looked at the interior of the vault—looked at the vault door. I did not see anything special about the vault door on Friday except the fresh tape on one of the bolts. That is all I noticed about the vault door. The top bolt had been disconnected. Someone called my attention to the fact; I do not remember who. I looked at the dial

(Testimony of Wesley Turner.)

of the safe thoroughly; it looked like any other safe door. I examined the door for finger-prints. It was not full of finger-prints; I couldn't find any on it. The fellows that had been turning the knob probably left a mark there. There is a difference between finger-marks and finger-prints. A fellow taking hold of a knob like this and turning it would not necessarily leave finger-prints. I could not see any finger-prints on this knob or on the door; it appeared to be pretty clean too. There were none that I could find; I couldn't see any on the handle. If they had been there I think I would probably have seen them. I had a microscope looking for finger-prints. I don't know whether I am a finger-print expert or not; I understand it. I didn't find any finger-prints on the whole safe. I tried the lock on the safe to see whether it worked; it seemed to. I looked at the inside of it and swung the door back a couple of times,—that is about all I recall now. I was looking for anything. I was not in particular looking for shavings; I wasn't looking for them more than anything else. I was out there to make an investigation. [87] I never noticed any drill hole at that time. I feel pretty sure I would have seen it if there was one and it wasn't covered up by something. I will say there was none. I didn't look for shavings. When I picked this roller thing—it is a receipt holder—I was just looking for finger-marks. I couldn't find any on there. I handed it back to Jordan and I noticed him place it back under the safe. I can't say ex-

(Testimony of Wesley Turner.)

actly whether he put it clear back under the safe or left it partly sticking out. I do remember he set it, or pushed it, back under. I didn't notice particularly whether it went clear under. After seeing it on the morning of the 5th I noticed it there the evening I was out. It was under the safe. I can't say whether it was in the exact place. I didn't pick it up or look at it again. I can't say that I paid any special attention to it on Sunday or on the succeeding days when I was there. I only picked it up and examined it the morning after the robbery. The second time I was out I think it was about the same place where the officer put it. As I recall it the vault is lighted by one light in the ceiling or hanging on a drop cord; I expect it was in the middle of the vault—I didn't pay any particular attention to the light. When I got there on the 24th Corey did not have a flash-light in his hand holding it this way; he was not trying to show the officers how one could pick the combination from that hole that was drilled in there. He was standing at the end of the safe talking to me not doing anything. I believe the ceiling light was on. The ceiling light was not put out at that time. When I went back in the vault after talking with Hudson on the outside the light was put out as I remember and Mr. Corey worked on the combination through this hole. I examined this tray or roller the first morning after the robbery through a magnifying-glass. [88] There are no shavings on it now to speak of. There is a little piece right here, I

(Testimony of Wesley Turner.)

believe; that is all I can see. The first morning I was out there I was not looking at it for shavings. I simply picked it up and examined it with a magnifying-glass looking for finger-prints. I can't say whether some bright specks now on the tray are steel shavings; they are too small. The ones that I saw, some of them were the size of the head of a pin and some a little bit larger. When I went out there on the 24th you could notice that there was a spoonful of shavings on that floor there. Well, this was sitting under the safe and there was a scattering of shavings on that part in here. I didn't touch it; I just looked in there and it was down this way. I didn't attempt to estimate the number of shavings. They were so that you could notice them very plainly—a scattering of them. There wasn't a great quantity; no, I couldn't tell you how many there were.

Q. There was not a great quantity of shavings anywhere was there?

A. Yes, there was considerable in front of the safe.

They were very plain, I think—there were more than there are in those two little bottles. I wouldn't say whether there would be as many as one of those bottles full; I couldn't say how much there is in those two little bottles without looking at them. If the contents were taken and scattered along in front of this desk here and this projection it would look like it was scattered all around there; you can scatter them around, yes. I don't know whether if they

(Testimony of Wesley Turner.)

were scattered it would look like they were scattered all around or would give that impression. I don't know whether that small quantity would make very much of a showing or not. [89]

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

When finger-prints are made on an object you can take them off. You can take all those finger-marks off of the sace of that safe with a cloth. You could put something on there—dampen the cloth a little bit, put a little bit of oil on it. I expect if you would rub hard enough you would get most of the finger-prints off without putting oil or water on the rag. After I discovered the shavings on September 24th I told the others there in the vault-room about it within a very few minutes.

On recross-examination by Mr. GRAVES, the witness testified as follows:

An expert burglar in handling a safe does not necessarily wear rubber gloves. He can, I suppose. I don't know whether he frequently does. If he does he doesn't leave any finger-prints through the gloves. Any handling of that knob would be pretty apt to erase the finger-prints on it, but it would leave others if it was done with the naked hand. On the knob or door there it is pretty hard to leave a finger-print—it is more of a smear; they are turning the knob with their fingers; it is hurling around in their fingers. I don't know whether there would be finger-prints there or not; that is the reason I ex-

(Testimony of Wesley Turner.)

amined it, I didn't know that if some one had used their naked hand, whether it would leave a finger-print before I had looked; there was a possibility. If a burglar or somebody else wore gloves to manipulate it it would be pretty apt to smear them so that I could not detect them. [90]

TESTIMONY OF A. L. JORDAN, FOR DEFENDANT.

A. L. JORDAN, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is A. L. Jordan. I have been connected with the police department of Spokane for nearly ten years and specialized in the identification bureau for a little over four years. On September 5th, 1925, I went to the fair-ground for the purpose of investigating the loss of money and arrived there, to the best of my recollection, between 8 and 9 o'clock in the morning. As I recall it Detectives Hunt and Self were then there. I went directly to the room which contained the vault. As I recall it the vault was closed until I arrived. After it was opened I think Mr. Reinhard proceded me into the vault. After being told what had happened I made an investigation of the outer door and safe inside the vault and the articles that I was told had been disturbed inside the vault,—some wooden trays, as I recall it used for storing papers and tickets, possibly. As I recall it they were sitting to one side of the safe. I examined the safe to see if

(Testimony of A. L. Jordan.)

there had been any force used in opening it, and for finger-prints which may have been left upon its surface. I examined the ticket-holder. I did not find any marks on the safe of any force that had been used nor finger-marks on the safe. Exhibit 23 is the ticket tray that I refer to; that has been in my possession since the 25th of September until one day last week and I brought it here this morning. On the morning of September 5th, as I recall it, it was sitting up on the stand upon which the safe rested, and immediately under the front side of the safe. I could not say whether any part of it extended out from under the safe; it was sitting up on the stand near the front so that it was visible to one standing in [91] front of the safe or above the box. I picked up the tray that morning and when I got through with it, as I recall, I set it back in about the same position it was when I picked it up. I did not see this tray under the safe on September 24th; I was not there on that occasion. I made a careful examination of the tray or ticket-roll after I picked it up, which necessitated holding it in different positions, looking at all sides of it from different angles. I had a small magnifying-glass; it was held at times in a position where it would be on a slant or turning over. I did not at that time discover the presence of any steel shavings. I presume I would if they were present. I did not find any finger-prints on the safe door and did not see any steel shavings scattered around on the floor on which the safe rested. I looked at the flooring on

(Testimony of A. L. Jordan.)

which the safe was resting in a casual way. I did not discover any at all there. On making this investigation there was an electric light inside the vault as I recall it. I also used my flash-light. I had it at times while in the vault.

On cross-examination by Mr. GRAVES, the witness testified as follows:

I had examined the door of the safe. I observed no drill hole there. There was none visible. I would have to see it before I could conclude there was one there. When I saw none I certainly concluded there was none. I did not look for shavings or drillings naturally. This tray had been in my possession since September 25th; as I recall it it was given me by Prosecutor Leavy. I did not bring it in the day after the burglary when I saw it. [92] I did not attach any importance to it then. I brought it in on September 25th at the request of Prosecutor Leavy just because he asked me to; he told me to keep it in my possession until this trial. I don't know whether when I found it first it sat clear under the safe or not; it might have set out part way. I don't know how far I put it in when I put it back; I was not particular about where I replaced it or where it was sitting. I was only interested in seeing whether there was any finger-prints on it. I am considered a finger-print expert. It is possible that a man handling the mechanism of this safe—the combination knob and handle would leave no finger-prints. The manner in which you have taken hold of this knob and

(Testimony of A. L. Jordan.)

turned it is about like anybody would take hold of it. You would not necessarily leave finger-prints that you would take. It would not probably do so. You probably would not leave finger-prints. To make make a finger-print on the lock handle you would have to press your finger on there without blurring it.

(Witness indicates method of putting finger-prints on without blurring.)

You could accomplish the same results with your hand in different positions. I do not mean to tell you that finger experts, to find a finger-print after a burglar, bare-handed, has worked on a safe he has got to do anything like that. He would have to have placed his fingers upon that in a certain way. He would have to put his finger on there. It could be done this way and he could do it this way and any other position in which he would put his finger there. A burglar does not necessarily have to try to make a finger-print so we can find it before he would leave any. I couldn't say that if this safe had been locked every night and unlocked every morning for [93] *for* several days by a man doing it in the ordinary way in which a man will, sometimes taking hold of it one way and sometimes another way but has just been doing it twice a day for several days that there would probably be no finger-prints there. Ordinarily in turning the dial one would not leave any finger-prints. If a man took his fingers and

(Testimony of A. L. Jordan.)

shut the door sometimes he would leave finger-prints. I don't remember observing any there. I made a careful examination. I couldn't find any finger-prints on that safe from beginning to end. Burglars have been known to put on some kind of a glove when they are fooling with a lock. In a good many cases that's the way they beat finger experts. I don't know whether all expert burglars do that; not all that I have tested do. If they put on a glove and handle the combination knob it would be very apt to erase the finger-prints of the man who customarily handled it. I made an investigation of the outside office where the auditor stays. I investigated to see if there had been any entrance forced through any window—that was all. I looked at the walls only in a casual way; did not make any particular examination of them. I made an examination of the vault door. I found nothing. I examined the vault door to see if it had been tampered with and found nothing out of place,—the vault door and it's mechanism, and it seemed to be all right. I examined it just about as carefully as I examined the rest and as carefully as outside of the use of a microscope as I examined this tray. I didn't find that a bolt had been taken out of one of the prinicpal locks and that they had been wrapped up with tape. [94]

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

There is a difference between finger-prints and

(Testimony of A. L. Jordan.)

finger-marks. A finger-mark would indicate that some article had been touched with the hand; a finger-print would show the ridges of the skin of the finger which had touched the article. For the purpose of getting a finger-print that is useful to an investigator we must have a print that shows the lines and pattern of the print of the finger. If when the particular finger was placed on the object it goes forward or backward in any way that blurs the lines so it just makes a mark out of it rather than a finger-print. At the time Prosecutor Leavy brought this ticket tray to me and requested me to keep it I examined it again. There was then steel shavings on it—not a great many; they could be easily seen. I needed no glass for the purpose. When I examined the windows in the office there was no evidence there of anyone having gone through the window. My examination led me to believe that the windows had not been disturbed. No dust that was on the window was disturbed.

On recross-examination by Mr. GRAVES, the witness testified as follows:

I don't think any of the dust on this safe stand in front of the safe was disturbed in any way on the morning of September 5th. On the evening of September 24th I don't recall whether any of that dust had been disturbed. The surface of the stand upon which the safe rested was such that any dust moved there would not be readily noticeable. If anyone had taken their fingers fumbling around

(Testimony of A. L. Jordan.)

there and working round there they would have got their fingers full of slivers. I don't think anyone working around there would have left marks in the dust. I think the dust would have settled below [95] the surface that he would amined this tray since for finger-prints. I couldn't tell whether it would be full of finger-prints unless I would make a careful examination. The proba- have touched with his fingers. I have never ex-

TESTIMONY OF C. T. THOMPSON, FOR DEFENDANT.

C. T. THOMPSON, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is C. T. Thompson. I am a police officer of the city of Spokane—the plain clothes department, known as the detective department, and have been a police office about 24 years and in the plain clothes department most of the time since April 1905. I went to the fair-grounds on Sunday morning with Officer Hudson. That was my first visit to the scene of this loss. We entered; I went to the door of the vault with Hudson. We looked over the outside of the door and on the inside, but I did not enter the vault at that time. About ten minutes later I entered the vault. Hudson was there. Hudson was working just at the left of the vault door and I helped move several articles, rolls of papers or tickets around there on the floor

(Testimony of C. T. Thompson.)

and lying on the west side, and he was sounding the west wall to see if he could find where there was anything had been removed in the wall. I assisted in that work. I would say I was in there 30 minutes, possibly a little longer and possibly not that long. We examined the safe and the things about the safe. The safe was open to us and we looked in the safe—looked over it for any marks of violence that might have been on it—whether it had been tried to be jimmied or anyone had tried to blow it or anything of that sort. I did not find any marks of that kind. I wouldn't say that I looked particularly at [96] the flooring on which the safe rested. I couldn't help but look at it while I was right in front of the safe. The safe sat up quite a little ways on a kind of box and I wouldn't say positively, but I think about four inches projected out. I was right there in front of it and saw all the interior of it and looked under the safe. I did not see any steel shavings about the safe or under the safe. If there had been steel shavings there at that time I couldn't help but see them. I think I can safely say that I am familiar with steel shavings. I have investigated several safes where they have been drilled. If I had seen any there I certainly would have become suspicious because we were requested to see if we couldn't find some marks of violence on either this safe door or the vault door. I don't know who the man was that made the request, some one that worked around

(Testimony of C. T. Thompson.)

there, and then there was a heavy older man—Mr. Reinhard, I believe. This was Sunday the 7th or 8th. I think I was in the vault right around thirty minutes—the outer door of the vault and inside. Along in the evening I was out there again. I didn't do much around the vault at that time.

On cross-examination by Mr. GRAVES, the witness testified as follows:

Someone out there requested me to find some evidence of marks of violence on the safe. In complying I examined the doors of the vault, the outside door and the inside. We examined the top, two sides and the front of the safe. I could not see the back as it sat against the wall. We examined it—looked it over, and also when the door was opened. That is all we did about examining the safe for marks of violence. I did look under the safe. I don't know as I could see what I was looking for. There were some pieces of iron or something under there was all that I saw under the [97] safe that I didn't move or touch. I don't know as I can really explain what I was looking for under the safe. In our line of business if we go to look something over we look it over as thoroughly as we can. Someone had suggested that I see if any violence had been done to the safe. I have had some experience in looking into safes that have been burglarized. I wasn't able to take the combination out and the rim off. We sent for a man to come out there and examine the lock. I

(Testimony of C. T. Thompson.)

did not request him to take it out. I can't say that anybody did. I went to Capt. Burns and asked him to have a locksmith come out there. I can't say that I heard anyone request him to take the lock out and I didn't see him do so. I don't claim to be an expert detective in safe cracking. I have had some dealings with it over a long period as a policeman. I asked the Captain to have a man brought out there who knew what locks were to see if the combination had been tampered with further than we were able to determine. It did not occur to me that to have the lock taken out might disclose something. I don't believe I thought of it. There were no drilled holes in sight. I couldn't say that I concluded there were no drillings. What I actually thought was somebody had the combination to the safe and opened it. I just jumped at that conclusion. I didn't come to that conclusion and go no further. I didn't see any drillings. I couldn't say I was expressly looking for them. I saw there was nothing of that kind there. There might have been a speck or two but they were very small. I would even have detected a speck or two; possibly not if it was very small. [98]

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

Mr. Corey, a locksmith, was sent out at my request while I was there on Sunday following the loss being discovered. I saw him around what I

(Testimony of C. T. Thompson.)

would call the outer door of the vault. He showed us where there was a bolt removed out of one of the tumblers and a piece of tape put around. It formed a portion of one of the tumblers of the vault I would call it—held the safe when it was locked. It is a bolt, I think they call it. Mr. Corey, while I was there, was examining the safe. I did not learn anything through that examination.

TESTIMONY OF A. E. AIKMAN, FOR DEFENDANT.

A. E. AIKMAN, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is A. E. Aikman. I am connected with the detective force of Spokane and known as a plain clothes man and was so employed last September. I was detailed on the fair loss and went to work on that job on Friday morning, September 5th. Detective Alderson went with me. We reached the fair-ground about 10 o'clock—10:15 perhaps. We went around to the steel cage that surrounds the vault and into the vault. Alderson and myself spent perhaps 15 minutes in the vault and occupied ourselves in looking round over the vault and safe. We looked over the safe particularly, inspected it. I suppose we were back at the station within an hour from the time we left. I did later work on Sunday morning, the 7th or 8th of September, with Alderson. We were around there about an hour. [99] We were not in the vault

(Testimony of A. E. Aikman.)

that day. That is the last work I did. When we were in the vault we observed the safe and around the safe in our usual way of making an inspection of robbery of that kind. I looked at the flooring on which the safe rested; I did not see any steel shavings there at that time. I would have known them if they were there; I would have had no difficulty in recognizing them. I didn't see any. I did nothing in the way of sounding the walls. I examined, on one of these occasions, the cut in this partition wall where this sliding panel was cut and observed something with reference to an auger hole. That was on the west side of the cut on the 2x4. The auger hole must have been bored through from the inside as the auger hole cut into the 2x4 and then run out like that into this here through the wall, and then the auger would start here, you see, and run out about here from the inside showing that it could not have possibly been bored from the outside. This 2x4 was on the outside of the auditor's office. On Friday morning I was there about ten minutes in the vault. I don't know how many officers were there at the time; they were in and out of there. There were quite a few; they were in and out and around. You could get three or four men in there. I didn't count the number of men we had there. I don't know whether they looked like quite an army. I didn't count them. I don't know how many was out there. I wouldn't want to make a guess as to whether it was 12 or 14. I don't know whether we could all get in there at once; I don't

(Testimony of A. E. Aikman.)

know whether we tried. I don't know how many were in when I was in. I don't know whether it was crowded in there. I wasn't crowded any; I had plenty of room. I looked around—looked all around the safe—made out regular inspection. [100] I don't remember having my hands in my pockets. I made an inspection of the safe. I looked around to see what I saw there that would be evidence. I didn't say that I didn't see anything about the safe; that is all I saw at that time. I was not in there again. That is all I saw at that time. Then I went out, got on the car and went home. Hudson didn't tell me about finding these two cut entrances. Capt. Burns sent me out to make an investigation—see what I could find out there. I don't know who found these doors. Alderson was with me when I looked at them. There were other men around there—other detectives. Hudson was there and Thompson—just the four of us. We did not all look at it together. When I saw something that looked like an auger hole I concluded that it had been bored from the inside. I do not remember that Hudson said it had been bored from the outside. That is all that I know about it.

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

When I was there on Friday there were a considerable number of people around there. I saw Troyer when I was looking at these cuts in the wall. I believe he is with the Burns Detective Agency.

TESTIMONY OF W. J. HUDSON, FOR DEFENDANT.

W. J. HUDSON, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is W. J. Hudson and was called by the plaintiff as a witness. In September last I was connected with the detective department of the Spokane police force. I have been with the department about ten years. On Sunday following the loss I went out to investigate the loss, Mr. Thompson going with me. We arrived there about ten o'clock. [101] I first went into the vault. I took a weight that was there and examined the walls of the vault and the floor and moved everything in the vault. Examined all the walls and everything inside of the vault for openings. I tested the walls all over. I tested the ceiling, the floor and everything. The safe was supposed to have been examined by several men. Yes, I looked it over. I looked under and tested the bottom of it. I made a complete examination of all that I could see about the safe and what was under the safe. I moved everything that was around the safe away from the corner,—everything. I moved everything that was movable and moved it back. I had to take a light for the exaxmination. With that light I could see everything that was to be seen. I don't remember seeing Exhibit 23 in there. I saw no steel shavings under or about the safe. I think, with the examination

(Testimony of W. J. Hudson.)

I made I would have seen them if they had been there. There were none there that I saw. I believe there were some scale weights on top of the safe. I did not see any lying underneath. I think I would recognize these steel shavings if I had seen them. I have met with them before. I was in the vault at this time a good hour. I did not make any particular examination of the vault after that. I remained on the case five weeks continuously from the time I went out there on that day. I was devoting no time to any other work. I was out there on the 24th of September. I was called by Chief of Police and notified to come to the station—that they had discovered something about the safe at the fair-grounds, and I went. The Chief, Capt. Burns and myself all went together. I went into the fair office and then into the vault. There was in the vault Mr. Corey, the safe man, Mr. Kizer, Mr. Semple, and Mr. Reinhard. I think Nordeen, a detective, was there at the time. We all came in there about [102] the same time. I discovered these steel shavings after going into the vault on that occasion. No one directed my attention to them. When I discovered them I was standing in front of the safe. Corey and Capt. Burns was talking facing this way to the left. Kizer was standing there then and Reinhard was back of him to one side. The light was an electric light at the time. There was no other then. On the previous occasion when I had examined the interior of the vault the light was electric light. I think it was the same as on this occasion. I think

(Testimony of W. J. Hudson.)

it was the same light; I am not sure of that, though. There was no difficulty in seeing the shavings. When I discovered them I was probably three feet away. I could see them very clearly. I picked up about half a teaspoon full or a little better. There were steel shavings scattered along on the board quite a bit and there was the two scale weights there. They have a little space—a little notch lying on the side and I moved them and in the notch of those two scale weights was a little small place about as big as yout little finger nail of sort of brass shavings in a little sort of a pile like they had dropped in. When I picked up this little more than a half a teaspoonfull of shavings I couldn't get them all on that rough board. I don't know as to whether I got as much as half of them. I don't know as to whether I got half of them or what proportion I got. It was a rough board and I don't know how badly they were scattered. I took them to the station and turned them over to Chief Turner and he took them to the chemist and he used all to analyze them instead of part of them. Nobody else took any of them away while I was there. I heard there was but I don't know anything about it; it is hearsay with me. The scale weights which I mentioned were about 9 inches to a foot away [103] from a line drawn from the center of the door down to the floor. I didn't notice any steel shavings just at the place where the brass shavings were. When I speak of a bunch, well I mean a little pile—a very small little pile; probably it would cover the size of a

(Testimony of W. J. Hudson.)

—smaller than a bean, very small. It is just about the same color as the metal that you hold in your hand. I think there were two scale weights; there may have been three. These brass filings were between the grooves of these weights. When I was there on Sunday the 7th of September these weights were not in that position or place nor was the brass there at that time. While I was standing there at that time I discovered the shavings Chief Turner called me away from the group. Prior to Chief Turner calling me away I had not suggested to anyone the presence of the steel shavings. Then it was discovered immediately. There were no piles or bunches of these steel shavings; they were scattered along on this board in front of the safe door and on the floor a little. I did not pick up any of them that were on the floor.

On cross-examination by Mr. GRAVES, the witness testified as follows:

I picked up the shavings by just brushing them off kind of like onto a piece of paper with my hand. I had to keep brushing to get enough of them. Yes, they were on the stand; that is where they were where I brushed them from. I didn't get any slivers in my hand. I wasn't looking for dust. I don't know whether there was any. I was not there Friday morning. Sunday morning was the first time I went out. I didn't notice any dust on the shelf; it was nice and clean just like the top of this. [104] The stand around there was not perfectly clean but right in front where it was used it was

(Testimony of W. J. Hudson.)

clean. I know it wasn't dusty. At the sides and back behind it it was dusty but in front the dust was all off. At no time when I looked at it was any dust that I know of. I had no trouble in brushing them off. It was rougher than the place you are indicating but I got them all right. When I went up there there was all kind of little things—ticket rolls and things like that in this place under and around the safe. I can't tell you all of them. I don't remember all the stuff that was there. I saw these two weights at that time; they were either on top of the safe or on one of the shelves. I used them to hammer the wall with. I remember they were there because I used them to hammer. I used one. I don't know what I did with them; laid them down; I don't know where. I spent probably an hour hammering the walls of the vault. I had been looking for an entrance into the vault. I didn't spend so very long in examining the safe—probably not much over five minutes. I wasn't paying any attention to the safe. I was engaged to find an inlet and outlet to that place and I found it.

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

I scraped the steel shavings with my hand, I couldn't get them all off; there would be some left in the cracks; they were rough boards.

TESTIMONY OF FRANK KEENAN, FOR DEFENDANT.

FRANK KEENAN, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows: [105]

My name is Frank Keenan. I am with the detective force of this city and have been a little over three years and have been with the police force fourteen years. I was with Officer Hudson when I was working on the fair case starting with Monday after that, but Sunday was my day off. I wasn't with him on that day. I started the Monday following the discovery of the loss. I had nothing to do with investigating this loss either on Friday or Saturday. The first time I was in the vault was when I went out with Luke May. I can't give you the date. It was probably five or six days after the fair closed. The fair runs one week ending September 6th or 7th. When I was there with Luke May it was before the discovery of the drilled hole. Hudson and myself went with May. We got some one to open the vault; I don't remember whether it was Lamb or Semple, and May and I went in and spent a few minutes in there. I looked around but didn't make any particular examination. I looked at the safe but did not make any close examination. It was on a stand or bench about three feet high. I looked around the stand or bench—around the top of that bench. I did not see any steel shavings. If I saw steel shavings, I think I would recognize them. I have seen them before. The morning following the

(Testimony of Frank Keenan.)

finding of the hole I was in there. I saw quite a few steel shavings at that time. There was no difficulty in seeing them. I couldn't say there was any difference in lighting on that occasion. The steel shavings were easily discernible when I was looking for them. I did not have to get down close to see them—I could see them two or three feet away. I don't remember seeing the scale weights. [106]

On cross-examination by Mr. GRAVES, the witness testified as follows:

We investigated a good many tips that didn't amount to anything. In fact all of them. I spent my time hither and thither on tips. You can't afford to pass any of them up; some of them may materialize; some of them might be good. I don't think the matter of a drilled hole was discussed before it was discovered. As far as I knew there was none. I was not looking for shavings particularly. The next time I went out there I had been told there were shavings there and I was looking for them and could see them. Nobody told me these scale weights were there. I wouldn't say I didn't see them but I don't recall that part of it. I saw a great many things in there I can't recall at this time.

TESTIMONY OF LEROY SELF, FOR DEFENDANT.

LEROY SELF, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is Leroy Self and I am a city detective and have been since last December. I have been with the police force three years this July. I was detailed on this job with Detective Hunt the morning this report came in. Hunt and I went out together on Friday morning shortly after 8 o'clock. We were there before Chief Turner arrived. I think I first entered the vault. I think Hunt and the identification man, Jordan, entered first. I was in there shortly afterwards. I made an investigation on the inside. I was there from some time after 8 o'clock until noon before we left. I might have spent 15 or 20 minutes or possibly more of that time in the vault. I saw the ticket tray but didn't see it inside of the vault. I saw Jordan and Detective Hunt handling that. They were looking at it. While I was in [107] the vault I had a flashlight. I think there was an incandescent globe also burning in the vault. The light was such that I think I would have been able to see the steel shavings easy if they were there. I was using the flashlight in making the examination most of the time when I was on the inside.

(Testimony of Leroy Self.)

On cross-examination by Mr. GRAVES, the witness testified as follows:

The vault appeared fairly light. I don't think it was as light as this room. I think I could see perfectly. I think I saw the safe and all about it plainly. Objects that were visible. I looked in the safe in the pigeon-holes around the face of the safe and all around it. I was looking principally for finger-prints or something that might have been dropped out of somebody's pocket. I am not a finger-printer. I had a chance to see them. I had seen them before. Whether I could see them by looking at that safe just depends upon how plain it was. There were papers scattered around the safe,—some tickets and the general condition of the vault was paper and stuff there all around as near as I could see. I would not attempt to tell you the particular things under the safe. I saw that in Jordan's hands. I do recollect that. I have not forgotten whatever else I saw. I told you there were papers, large ticket rolls—big piles of them, that was outside of the safe. I saw papers and these small envelopes that had the ends torn off of them in the safe. I wouldn't say what else I saw around on the outside of the safe. I saw everything that was in the vault and safe. There were different articles. I don't remember what they were. [108] I knew nothing about the safe having been drilled. I didn't see where it had been drilled; I thought nothing about it at that time. I

(Testimony of Leroy Self.)

didn't see where it had been drilled. Hadn't thought anything in particular at the time; I was just looking around and didn't see any shavings.

On redirect examination by Mr. WILLIAMS the witness testified as follows:

My eyesight is good—very good.

TESTIMONY OF J. W. BOLT, FOR DEFENDANT.

J. W. BOLT, called and sworn as a witness on behalf of defendant testified, on direct examination, as follows:

My name is J. W. Bolt. I reside in Spokane. I am a mechanic with a knowledge of locks. I have not followed any particular line with reference to safes. I am a general all around mechanic on cash registers and things of that kind. I have had forty years' experience in the drilling of safes and with combinations of safes and opening safes where something goes wrong. At the request of the Fair Association shortly after this loss was discovered I visited the fair-grounds. I was asked to go out and change the combination; I did this. I think it was Mr. Randall, one of the attorneys for plaintiff here that called me. This was Friday morning after the robbery was discovered. When I got there I changed the combination of the safe and vault door. I took the combination out of the safe—that is, I took the stub of the combination out. I did not look the safe over. I think

(Testimony of J. W. Bolt.)

it was on Sunday afterwards I was requested to go out there and I looked the safe over after Corey had found a drill hole. I went out and looked at it. [109] I did not see the safe again. When I was out there changing the combination I did not look for steel shavings. When I was there at the time following the discovery of this hole my attention was called to a few steel shavings on the platform where the safe stood. Some of them were very easy to be seen. I suppose they were a grain or two in weight. 24 grains make a pennyweight; twenty pennyweights an ounce. It wouldn't nearly fill a teaspoon; it would be a very small quantity. This was on Sunday when I saw them. I don't know how long it was after the drilled hole had been discovered.

On cross-examination by Mr. GRAVES, the witness testified as follows:

I had been out of town two or three days before this Sunday I went out, and after I came back I was asked to go and look at it. I was told what Corey had found. When I changed the combination I didn't do anything that would have exposed that hole. I couldn't see the hole from anything that I did.

On redirect examination by Mr. WILLIAMS, the witness testified as follows:

I didn't discover the hole at that time.

Plaintiff and defendant both rest. [110]

Mr. WILLIAMS.—If your Honor pleases the

evidence being closed at this time, the defendant moves the Court to instruct the jury to return a verdict in favor of the defendant for the reason that the evidence is insufficient to warrant the submission of the case to the jury or even to support a judgment.

Mr. GRAVES.—The first affirmative defense I move to withdraw from the jury on the ground that there is nothing to sustain it whatever.

The COURT.—What have you to say to that?

Mr. WILLIAMS.—There isn't any testimony directed squarely to that unless it would be a question of inference.

The COURT.—The motion of plaintiff will be granted.

Mr. GRAVES.—The third affirmative defense I move to withdraw from the jury on the ground that there is no evidence whatever to support it.

Mr. WILLIAMS.—I will not resist that motion.

The COURT.—That motion will be granted.

There were extensive arguments on the defendant's motion to instruct the jury to return a verdict in favor of the defendant.

The COURT.—This case, as counsel suggested in argument, has been to me a most interesting one, but at the same time one not free from its burden. There are many contradictory inconsistencies in the case but that is all the more reason why it seems to me that it must go to the jury. If there is anything wrong with this ruling counsel will have later an opportunity to again present the case.

The motion for directed verdict will be denied.

Mr. WILLIAMS.—Exception. [111]

At the close of plaintiff's case defendant requested the Court to give the jury the following instructions, to which exceptions have been taken.

1. I instruct you that under the evidence in this case defendant is not liable, and you will return a verdict in favor of said defendant.

4. You are further instructed that if you should find by a preponderance of the evidence that the alleged burglar or burglars opened the door of the safe by the use of the manipulation of the combination lock on the safe, and in this manner was able to secure the money contained in the safe, that then your verdict should be in favor of defendant.

5. You are further instructed that if you should find that the alleged burglar or burglars opened the safe door by the use of a key, or by the manipulation of the combination, your verdict should be in favor of defendant, even though you should find from the evidence that the alleged burglar or burglars obtained knowledge of the combination and how to manipulate it for the purpose of opening the door, through some fraud, or by the use of a hole made in the safe door by themselves or others.

6. You are further instructed that unless you should find that a plug in the hole in the safe door under the rim adjoining the dial was removed by the alleged burglar or burglars, your verdict in this action must be for the defendant. [112]

7. You are instructed further that the policy of

insurance on which plaintiff sues was effective commencing with noon on August 31st, 1924, and up to and including September 10, 1924, at 12 o'clock noon. If you should find from the evidence that the alleged burglar or burglars removed a plug from the hole under the rim, and by means of said hole they were able to and did open the door of the safe, nevertheless, I instruct you to entirely disregard the existence of such hole, or the removal of any plug therefrom, unless you shall find by a preponderance of the evidence that said hole was bored by the burglar or burglars, or the plug was removed by such burglar or burglars between noon on August 31st, 1924, and the time of the discovery by the Fair Association that the safe had been opened, and the money taken.

8. You are further instructed that if any act or thing was done by the alleged burglar or burglars prior to noon, August 31, 1924, the date when the said policy became effective, for the purpose of burglarizing said safe, that no liability would attach, under the policy, for such act previously done, nor can you consider any such act for the purpose of creating or fixing a liability under the policy.

Thereupon, the case was argued to the jury by the attorneys for plaintiff and defendant. [113]

After the argument of counsel, the Court gave the jury the following instructions:

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: It now becomes the duty of the Court to explain to you

the issues in this case and to instruct you upon the rules of law applicable thereto by which you are to be guided in your deliberations, and it is your duty to accept these instructions as correct so far as the law of the case is concerned, and to be guided by them. This action is based on a policy of burglary insurance, in which the plaintiff alleges that the safe covered by the policy was burglariously entered during the night of September 4, 1924, and the contents thereof feloniously stolen and carried away, and recovery is sought for the amount of the money so burglariously stolen. The pertinent provision of the policy upon which this action is based reads as follows:

"Fidelity and Deposit Company of Maryland does hereby agree with the Assured to indemnify the Assured for all loss by burglary occasioned by the abstraction of any such property from the interior of any safe or vault described in the declarations and located in the Assured's premises by any person or persons making felonious entry into such safe or vault by actual force and violence, of which force and violence there shall be visible marks made upon such safe or vault by tools, explosives, chemicals, or electricity." The words "such property" contained in this provision of the policy include money and securities. The period of the policy, that is to say, the period during which the Assured was under the protection stipulated in the policy, was from August 31, 1924, to September 10, 1924, at twelve o'clock noon, Standard Time,

as to each of said dates. The plaintiff alleges that during the night of September 4, 1924 or the early morning hours of September 5, 1924, burglars effected a felonious entry into the office, vault and safe herein involved, and abstracted from the interior of the safe $14,954.85 in money belonging to the plaintiff and kept in such safe; that such entry was effected into the vault and safe by actual force and violence in that tools were used for cutting and removing bolts on the vault door and for drilling into the safe door, thus enabling the burglars to gain access to the interior of the safe and abstract the money contained therein, and that there were visible marks of the tools so used upon both the safe and the vault doors. In this connection I instruct you that the safe, not the vault, was the thing covered by the policy of insurance in this case, and that the actual force and violence provided by the policy has reference to effecting an entry into the safe as contradistinquished from the vault.

To this complaint the defendant interposes a general denial and in addition affirmatively alleges that if any of the moneys referred to in the complaint were abstracted from the safe as alleged therein, that entry to the safe was effected by the manipulation of the lock thereof without the employment of any actual force or violence. The allegations of the complaint upon the one hand, and the denials thereof upon the other, present the issues which you are to determine in this case.

Under the provision of the policy to which I have adverted you will observe that it is necessary that the loss involved was a loss occasioned by burglary, and consisted in abstracting money from the interior of the safe in question by a person or persons making felonious entry into such safe by actual force and violence, of which force and violence there shall be visible marks made upon the safe by tools, there being no evidence tending to prove the use of explosives, chemicals, or electricity. [114] By the word "felonious" as used in these instructions in meant "done with intent to commit a crime."

I charge you that if you find from a preponderance of the evidence that some years previously to the entry into the safe referred to in the complaint a man employed by the plaintiff had drilled a hole in the door of the safe for the purpose of effecting an entry into it, and that after effecting such entry the hole was closed by a steel plug driven into it, and if you further find from such preponderance of the evidence that at the time, or previous to the time of the entry referred to in the complaint, the person or persons effecting such entry did so by drilling or drawing out with tools the plug which had been previously driven into the hole in the safe door, and were thereby enabled to effect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe

door by reason of such drilling or drawing out of such plug was visible mark of force and violence made upon such safe within the terms and meaning of the policy.

As I have already said, the policy in suit covered the period from noon of August 31, 1924, to noon of September 10, 1924. The defendant cannot be held liable upon such policy unless the money which was taken from the safe, as referred to in the complaint was taken or abstracted from the safe during that period. However, if you find from a preponderance of the evidence that the money was taken from the safe during that period, under such circumstances as would render the defendant liable upon its policy, as these have heretofore been defined to you, then defendant is liable for the loss of the plaintiff caused thereby, although you should further find that the person or persons who effected the entrance into the safe and took the money therefrom during the policy period had previously to its commencement removed the plug from the hole in the safe door by drilling or drawing it out with tools, and thereby acquired a knowledge of the working of the combination by means of which they were subsequently and during the policy period able to effect an entrance into the safe and extract therefrom its contents.

If you find from a preponderance of the evidence that the person or persons who effected an entrance into the safe and took the money therefrom, as described in the pleadings and evidence

did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe door by means of which such person or persons were enabled to gain a knowledge of the working of the combination, and so to work the combination and open the safe door and take the money from the safe, then I charge you that defendant is not relieved from liability because the final act of entering the safe was effected by working the combination on the safe door. If such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the plug in the safe door, and the person or persons so drilling or drawing out such plug thus obtained access to the combination and thereby were enabled to effect an entrance into the safe, the defendant is liable, if you find the other circumstances present which I have stated to you to be necessary to sustain its liability.

In this connection I charge you that the abrasion or scratch and the small pit or hole in the brass disc constituting a part of the combination of the safe, which was offered in [115] evidence and examined by the jury, are not to be considered by you as visible marks made upon the safe within the meaning of the policy, or as any evidence of the use of either force or violence in effecting an entrance into the safe. The sole force and violence which you will consider is the force and violence, if any, employed in drilling out or drawing out

the plug from the hole in the safe door, if you find from the evidence that the hole had been closed as already stated, and that such plug was drilled or drawn out, and the only visible mark showing the use of tools which you can consider is the hole in the safe door made by drilling out or extracting the plug in question if you find such hole was so made.

On the contrary, I charge you that if entrance to the safe was effected without the employment of actual force or violence, but by means of working or manipulating the combination on the door of the safe, and the person so working or manipulating such combination without force or violence was enabled to gain access to the interior of the safe and thereby steal and carry away its contents, such an entrance is not within the terms of the policy in suit, and the defendant company is not liable therefor.

I further charge you that the burden of proof in this case rests upon the plaintiff to establish that at the time and upon the occasion in question the safe was burglariously entered by some person or persons, and that such felonious entry into the safe was effected by actual force and violence, of which force and violence there must be visible marks made upon such safe by tools, and that by means of the entry so effected the money in question was abstracted from the safe.

In the event your verdict is in favor of the plaintiff, the amount of your verdict will be the sum of $15,211.54.

After the completion of the instructions and before the jury retired to consider their verdict, defendant took exceptions which were allowed as follows:

EXCEPTIONS TO INSTRUCTIONS OF COURT TO THE JURY.

Exception No. 1. Defendant excepts to the refusal of the Court to give defendant's requested instruction No. 1 for a peremptory verdict. [116]

Exception No. 2. Defendant excepts to the refusal of the Court to give its requested instruction No. 2.

Exception No. 3. Defendant excepts to the refusal of the Court to give its requested instruction No. 3.

Exception No. 4. Defendant excepts to the refusal of the Court to give its requested instruction No. 4.

Exception No. 5. Defendant excepts to the refusal of the Court to give its requested instruction No. 5.

Exception No. 6. Defendant excepts to the refusal of the Court to give its requested instruction No. 6.

Exception No. 7. Defendant excepts to the refusal of the Court to give its requested instruction No. 7.

Exception No. 8. Defendant excepts to the refusal of the Court to give its requested instruction No. 8.

Exception No. 9. Defendant excepts to that in-

struction found on page 4 of the typewriten instructions of the Court, being the first instruction on that page, and to each and every part thereof, and particularly to that part wherein the Court says:

> "That if you further find from such preponderance of the evidence that at the time or previous to the time of the entry referred to in the complaint the person or persons effecting such entry did so by drilling or drawing out with tools the plug which had been previously driven into the hole in the safe door and were thereby enabled to effect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe [117] door by reason of such drilling or drawing out of such plug was a visible mark of force and violence made upon such safe within the terms and meaning of the policy."

And more particularly to the submission to the jury of the question of being permitted to return a verdict in favor of the plaintiff even though the force and violence was previous to the commencement of the policy period.

Exception No. 10. The defendant excepts to that other instruction starting on page 4 and ending on page 5, and to each and every part thereof, and particularly to that part wherein the Court says:

> "Although you should further find that the person or persons who effected the entrance into the safe and took the money therefrom

during the policy period had previous to its commencement removed the plug from the hole in the safe door by drilling or drawing out with tools and thereby acquired a knowledge of the working of the combination by means of which they were subsequently, and during the policy period, able to effect an entrance into the safe and extract therefrom its contents."

Exception No. 11. Defendant excepts to the instruction appearing on page 5, and to each and every part thereof as follows:

"If you find from a preponderance of the evidence that the person or persons who effected an entrance into the safe and took the money therefrom, as described in the pleadings and evidence, did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe door by means of which such person or persons were enabled to gain [118] a knowledge of the working of the combination, and so to work the combination and open the safe door and take the money from the safe, then I charge you that defendant is not relieved from liability because of the final act of entering the safe was effected by working the combination on the safe door. If such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the plug in the safe door, and the person or persons so drilling or drawing out such plug thus obtained access to the combination and thereby were en-

abled to effect an entrance into the safe, the defendant is liable, if you find the other circumstances present which I have stated to you to be necessary to sustain its liability."

The Court also gave the following instruction to which there was no objection:

"In this connection I charge you that the abrasion or scratch and the small pit or hole in the brass disc constituting a part of the combination of the safe, which was offered in evidence and examined by the jury, are not to be considered by you as visible marks made upon the safe within the meaning of the policy, or as any evidence of the use of either force or violence in effecting an entrance into the safe. The sole force and violence which you will consider is the force and violence, if any, employed in drilling out or drawing out the plug from the hole in the safe door, if you find from the evidence that the hole had been closed as already stated, and that such plug was drilled or drawn out, and the only visible mark showing the use of tools which you can consider is the hole in the safe door made by drilling out or extracting the plug in question if you find such hole was so made."

Received a copy this 10th day of June, 1925, of above bill of exceptions as proposed by defendant.

GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff. [119]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, J. Stanley Webster, Judge of the above-court, and the Judge who presided in said court on the trial of the foregoing cause, do hereby certify that the matters and proceedings set out in the foregoing bill of exceptions are matters and proceedings occurring in this cause and not already a part of the record therein, and that the bill of exceptions was served and filed within the time allowed by law as extended by the order of the Court, and that said bill of exceptions is made a part of the record herein.

I further certify that after amendments were proposed by the plaintiff to said bill of exceptions a hearing was had thereon and all the amendments proposed by plaintiff, which were allowed by the Court, have been incorporated in said bill of exceptions.

I further certify that said bill of exceptions conforms to the truth and contains all the matters and facts material in the proceedings heretofore occurring in the cause and not already a part of the record therein and necessary for the review of this cause by the Circuit Court of Appeals, and the said bill of exceptions, with the amendments proposed by the plaintiff incorporated therein, so far as allowed, is hereby settled, allowed and certified as the true bill of exceptions in this cause.

The Clerk of this court is directed to forward to the Circuit Court of Appeals all exhibits introduced

in evidence which are hereby made a part of this bill of exceptions.

Done in open court this 30th day of June, 1925.

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington. Jun. 30, 1925, ——M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [120]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

L–4321.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now Fidelity and Deposit Company of Maryland, a corporation, defendant herein, and says:

That on or about the 8th day of May, 1925, this court entered a judgment herein in favor of plaintiff, Spokane Interstate Fair Association, a corporation, and against the said defendant, Fidelity and Deposit Company of Maryland, a corporation, in the

sum of $15,211.54, with interest from the date thereof, with costs, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, the said Fidelity and Deposit Company of Maryland prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States for the correction of the errors so complained of, and that this court fix the bond to operate also as a supersedeas, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

WILLIAMS & CORNELIUS,
JAS. A. WILLIAMS,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern Dist. of Washington. June 30, 1925, ——M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [121]

Filed in the U. S. District Court, Eastern Dist. of Washington. June 30, 1925, ——M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. L.—4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the defendant, Fidelity & Deposit Company of Maryland, and makes the following assignments of error, which defendant avers occurred on the trial of this cause, and which defendant will rely upon in the prosecution of the writ of error in the above-entitled cause.

1. The Court erred in denying defendant's motion made at the time when the evidence was all in, that the jury be instructed to return a verdict in favor of defendant.

2. The Court erred in refusing to give defendant's requested instruction 1 as follows:

> I instruct you that under the evidence in this case defendant is not liable, and you will return a verdict in favor of said defendant.

3. The Court erred in refusing to give defendant's requested instruction 4 as follows:

You are further instructed that if you should find by a preponderance of the evidence that the alleged burglar or burglars opened the door of the safe by the use of the manipulation of the combination lock on the safe, and in this manner was able [122] to secure the money contained in the safe, that then your verdict should be in favor of defendant.

4. The Court erred in refusing to give defendant's requested instruction 5 as follows:

You are further instructed that if you should find that the alleged burglar or burglars opened the safe door by the use of a key, or by the manipulation of the combination, your verdict should be in favor of defendant, even though you should find from the evidence that the alleged burglar or burglars obtained knowledge of the combination and how to manipulate it for the purpose of opening the door, through some fraud, or by the use of a hole made in the safe door by themselves or others.

5. The Court erred in refusing to give defendant's requested instruction 6 as follows:

You are further instructed that unless you should find that a plug in the hole in the safe door under the rim adjoining the dial was removed by the alleged burglar or burglars, your verdict in this action must be for the defendant.

6. The Court erred in refusing to give defendant's requested instruction 7 as follows:

You are instructed further that the policy of insurance on which plaintiff sues was effective

commencing with noon on August 31, 1924, and up to and including September 10, 1924, at 12 o'clock noon. If you should find from the evidence that the alleged burglar or burglars removed a plug from the hole under the rim, and by means of said hole they were able to and did open the door of the safe, nevertheless, I instruct you to entirely disregard the existence of such hole, or the removal of any plug therefrom, unless you shall find by a preponderance of the evidence that said hole was bored by the burglar or burglars, or the plug was removed by such burglar or burglars between noon on August 31, 1924 and the time of the discovery by [123] the Fair Association that the safe had been opened, and the money taken.

7. The Court erred in refusing to give defendant's requested instruction 8 as follows:

You are further instructed that if any act or thing was done by the alleged burglar or burglars prior to noon, August 31, 1924, the date when the said policy became effective, for the purpose of burglarizing said safe, that no liability would attach, under the policy, for such act previously done, nor can you consider any such act for the purpose of creating or fixing a liability under the policy.

8. The Court erred in instructing the jury as follows:

I charge you that if you find from a preponderance of the evidence that some years previously to the entry into the safe referred

to in the complaint a man employed by the plaintiff had drilled a hole in the door of the safe for the purpose of effecting an entry into it, and that after effecting such entry the hole was closed by a steel plug driven into it, and if you further find from such preponderance of the evidence that at the time, or previous to the time, of the entry referred to in the complaint, the person or persons effecting such entry did so by drilling or drawing out with tools the plug which had been previously driven into the hole in the safe door, and were thereby enabled to effect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe door by reason of such drilling or drawing out of such plug was visible mark of force and violence made upon such safe within the terms and meaning of the policy.

9. The Court erred in instructing the jury as follows:

As I have already said, the policy in suit covered the period from noon of August 31, 1924, to noon of September 10, 1924. [124] The defendant cannot be held liable upon such policy unless the money which was taken from the safe, as referred to in the complaint, was abstracted from the safe during that period. However, if you find from a preponderance of

the evidence that the money was taken from the safe during that period, under such circumstances as would render the defendant liable upon its policy, as these have heretofore been defined to you, then defendant is liable for the loss of the plaintiff caused thereby, although you should further find that the person or persons who effected the entrance into the safe and took the money therefrom during the policy period had previously to its commencement removed the plug from the hole in the safe door by drilling or drawing it out with tools, and thereby acquired a knowledge of the working of the combination by means of which they were subsequently and during the policy period able to effect an entrance into the safe and extract therefrom its contents.

10. The Court erred in instructing the jury as follows:

If you find from a preponderance of the evidence that the person or persons who effected an entrance into the safe and took the money therefrom as described in the pleadings and evidence, did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe door by means of which such person or persons were enabled to gain a knowledge of the working of the combination, and so to work the combination and open the safe door and take the money from the safe, then I charge you that defendant is not relieved from liability be-

cause of the final act of entering the safe was effected by working the combination on the safe door. If such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the plug in the safe door, and the person or persons so drilling [125] or drawing out such plug thus obtained access to the combination and thereby were enabled to effect an entrance into the safe, the defendant is liable, if you find the other circumstances present which I have stated to you to be necessary to sustain its liability.

11. The Court erred in overruling defendant's motion for new trial.

WHEREFORE, the said defendant, the plaintiff in error, prays that the judgment of the said Court be reversed; that such directions be given that full force and efficacy may inure to the defendant by reason of the assignments of error above, and the defenses set out in its answer filed in said cause.

WILLIAMS & CORNELIUS,
JAS. A. WILLIAMS,
Attorneys for Plaintiff in Error (Defendant in the Lower Court.) [126]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

(No. 4313.)

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 30 day of June, 1925, came the defendant, Fidelity and Deposit Company of Maryland, and filed herein and presented to the Court its petition praying for the allowance of a writ of error and filed therewith its assignments of error intended to be urged by it and praying that the bond to be given to operate also as a supersedeas and stay bond be fixed by the Court and also that a transcript of the record and proceedings and papers upon which the judgment rendered herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the bond for such writ of error and also to operate as a supersedeas is fixed at the

sum of $17,000.00, and upon defendant giving such bond all proceedings to enforce such judgment be stayed until such writ of error is determined.

J. STANLEY WEBSTER,
U. S. District Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington, June 30, 1925. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [127]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4313.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation.

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Fidelity & Deposit Company of Maryland, a corporation, the defendant above named as principal, and National Surety Company; a surety corporation organized and existing under the laws of the state of New York and au-

thorized to become sole surety on judicial bonds as surety, are held and firmly bound unto Spokane Interstate Fair Association, its successors and assigns, in the sum of $17,000.00 to be paid said Spokane Interstate Fair Association, for which payment well and truly to be made we bind ourselves and each of us jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June, 1925.

WHEREAS, the above-named Fidelity & Deposit Company of Maryland has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of United States for the Eastern District of Washington, Northern Division, and said District Court has fixed the bond to be given on said writ of error in the sum of Seventeen Thousand Dollars ($17,000.00) to operate for the purpose of the writ of error, and also as a supersedeas and stay: [128]

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal, Fidelity and Deposit Company of Maryland shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation should be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By WILLIAMS & CORNELIUS,
Its Attorneys.

[Seal N. S. Co.]

NATIONAL SURETY COMPANY,
By S. A. MITCHELL,
Resident Vice-President.
G. B. FERGUSON,
Resident Asst. Secretary.

Approved: June 30th, 1925.

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington, Jun. 30, 1925,——M. Allan G. Paine, Clerk. Eva M. Hardin, Deputy. [129]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

(No. L.—4321.)

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable Judge of the District Court of the United States for the Eastern District, Northern Division, GREETING:

Because of the records and proceedings as also in the rendition of the judgment on a plea which, in said District Court before you or some of you between Fidelity and Deposit Company of Maryland, plaintiff in error, (defendant in the lower court), and Spokane Interstate Fair Association, defendant in error (plaintiff in the lower court), a manifest error hath happened to the great damage of the Fidelity and Deposit Company of Maryland, plaintiff in error, as by its complaint appears:

We, being willing that error, if any, hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ so that you have the same at the city of San Francisco, in the State of California, on July 30, 1925, the said Circuit Court of Appeals to be then and there held that the record and [130] proceeding aforesaid being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the

United States this 30th day of June, in the year of our Lord, 1925.

ALAN G. PAINE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

J. STANLEY WEBSTER,

District Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington. Jun. 30, 1925, ——M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [131]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.–4321.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Defendant in Error.

CITATION ON WRIT OF ERROR.

The President of the United States to Spokane Interstate Fair Association and to Messrs. Randall & Danskin and Graves, Kizer & Graves, Your Attorneys, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, on July 30, 1925, pursuant to a writ of error regularly issued and which is on file in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court wherein Fidelity and Deposit Company of Maryland is plaintiff in error (defendant in the lower court), and Spokane Interstate Fair Association is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, this 30 day of June, 1925.

J. STANLEY WEBSTER,
U. S. District Judge.

Attest: ALAN G. PAINE,
Clerk of Said Court.

Received a copy this 30th day of June, 1925.

GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff (Deft. in Error). [132]

United States of America,
Eastern District of Washington,—ss.

I, A. F. Kees, United States Marshal, for the

above district, hereby certify that I served the within citation on the Spokane Interstate Fair Association, a corporation, defendant in error, on the 2d day of July, 1925, in the city and county of Spokane in the Eastern District of Washington, by then and there delivering to and leaving with Thomas S. Griffith, president of the said defendant in error, a full, true and correct copy of said citation.

Dated at Spokane in the Eastern District of Washington, this 2d day of July, 1925.

A. F. KEES,
United States Marshal.
By A. L. Dilley,
Deputy.

Filed in the U. S. District Court, Eastern Dist. of Washington. June 30, 1925. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [133]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. L. 4321.

SPOKANE INTERSTATE FAIR ASSOCIATION,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant,

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare complete record in this case which will include complaint, answer, reply, judgment, stipulation extending time for serving bill of exceptions, order extending time for serving bill of exceptions, petition for new trial, order denying petition for new trial, bill of exceptions, order settling bill of exceptions, petition for writ of error, assignments of error, order allowing writ of error, bond for writ of error, writ of error, citation and proof of service, and praecipe.

Dated this 3d day of July, 1925.

WILLIAMS & CORNELIUS,
Attorneys for Plaintiff in Error.

We approve of the above:

GRAVES, KIZER & GRAVES,
Attorneys for Defendant in Error.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington, Jul. 3, 1925, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [134]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L. 4321.

SPOKANE INTERSTATE FAIR ASSOCIATION, a Corporation,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the above-entitled court, do hereby certify that the foregoing pages numbered from 1 to 134, inclusive, constitute and are a full, true and correct copy of that part of the record and proceedings as called for in the praecipe of the plaintiff in error, and as the same remain on file and of record in said District Court, and that the same constitutes my return on the writ of error from the judgment of said District Court, which writ of error was lodged and filed in my office on the 30th day of June, A. D. 1925.

I further certify that I attach hereto, and herewith transmit the original citation, and the original writ of error issued in said cause.

I further certify that the fees of the clerk of preparing and certifying said transcript amounts to the sum of Twenty and 60/100 ($20.60) Dollars, which amount has been paid to me in full by the attorney for the plaintiff in error. [135]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, Washington, in said District, this 13 day of July, A. D. 1925.

[Seal] ALAN G. PAINE,
Clerk. [136]

[Endorsed]: No. 4639. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity & Deposit Company of Maryland, a Corporation, Plaintiff in Error, vs. Spokane Interstate Fair Association, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed July 15, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,
Plaintiff in Error,
vs.
INTERSTATE FAIR ASSOCIATION, a corporation,
Defendant in Error.

No. 4639.

UPON WRIT OF ERROR
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF WASHINGTON
NORTHERN DIVISION

PLAINTIFF'S

DEFENDANT IN ERROR'S BRIEF

JAS. A. WILLIAMS,
E. A. CORNELIUS,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,
Plaintiff in Error,
vs.
INTERSTATE FAIR ASSOCIATION, a corporation,
Defendant in Error.

No. 4639.

UPON WRIT OF ERROR
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF WASHINGTON
NORTHERN DIVISION

DEFENDANT IN ERROR'S BRIEF

JAS. A. WILLIAMS,
E. A. CORNELIUS,
Attorneys for Plaintiff in Error.

STATEMENT

This action was brought by Plaintiff in Error, Interstate Fair Association, against Plaintiff in Error, Fidelity and Deposit Company of Maryland, to recover the sum of $14,974.35 on an insurance policy. (Tr. 14.) There was a verdict and judgment for Defendant in Error in the sum of $15,211.54 (Tr. 26), from which judgment this Writ of Error is prosecuted.

The policy of insurance by its terms was effective from noon, August 31, 1924, for the period of ten days. (Tr. 18.) The loss claimed occurred on the night of September 4, 1924, through the abstraction of the money in question from the safe which was covered by the policy.

The question involved, on this writ of error, is whether the evidence brings the case within the protection of the policy, and certain instructions which Plaintiff in Error claims were erroneous.

The material portions of the policy are the following:

> "Fidelity and Deposit Company of Maryland does hereby agree with the assured, * * *
>
> 1. To indemnity the assured for all loss by burglary occasioned by the abstraction of any such property from the interior of any safe or vault described in the Declarations and located in the Assured's premises, by any person

or persons making felonious entry into such safe or vault *by actual force and violence, of which force and violence there shall be visible marks made upon such safe or vault by tools, explosives, chemicals or electricity.* * * *

4. This agreement shall apply only to loss or damage, *as aforesaid,* occurring within the policy period defined in Item 4 of this Declaration or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS: * * *

C. * * * nor shall the Company be liable for loss or damage if the assured, any associate in interest, or servant or employe of the Assured or any other person lawfully upon the premises, is implicated as principal or accessory in effecting, or attempting to effect, the burglary; nor unless all vault, safe and chest doors are properly closed and locked by combination or time lock at the time of the loss or damage; *nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock.* * * *"

By Item 4 of the Declarations, it is provided:

"The Policy Period shall be from August 31, 1924 until Sept. 10, 1924, at 12 o'clock noon, standard time at the location of the premises as to each of said dates." (Italics ours.)

The complaint alleged that on the night of September 4, or the morning of September 5, 1924, the safe was burglarized, by an entry being made into the safe, by actual force and violence, such force

and violence leaving visible marks to-wit: A drilled hole made by tools, explosives, chemicals or electricity. (Tr. 3.)

The answer denied the burglarious entry, and that it was made by actual force or violence, and denied that there were any visible marks made upon the safe by tools, explosives, chemicals or electricity. For an affirmative defense it was alleged that any entry, made to the safe for the purpose of taking the money, was effected by opening the safe by the use of a key or by the manipulation of the lock. (Tr. 7.)

Since we will fully discuss the material evidence in the argument, we will now make but a brief general statement as to the other facts.

Defendant in Error conducts a fair at Spokane in the early days of September of each year, the fair running for one week. On this occasion the fair opened September 1. (Tr. 70.) The safe in question was located in a vault. (Tr. 43, 57.) Entry was effected to this vault through a steel door which was locked by a combination lock. (Tr. 43.) Access to the vault door was obtained by passing through a steel sliding door, a wire caging surrounding the entrance to the vault. This wire caging is a part of the accounting room of the Fair Association (Tr. 43) and access thereto and likewise to the door of the vault can only be had through this accounting room. At the time of the alleged robbery, there was

no known way of obtaining access to the accounting room, except through the main offices, or through two side windows latticed with steel netting. (Tr. 59, 60, 66.) It is certain that the ones taking the money did not enter through these windows. (Tr. 60, 119.) A general diagram of the situation is shown by Exhibit 3. The main offices, of the Fair Association, are but a few feet away from the accounting room, with passages leading therefrom to the accounting room. In these main offices there was, during the night hours, various watchmen and others connected with the Fair continually. (Tr. 44, 61, 66, 67.) Defendant in Error, during fair week, maintained a police department, and one officer, connected with such department, was required to be constantly in the room maintained for that purpose (Tr. 47, 60, 66, 68) which was about 20 feet from the vault in a direct line, or about 40 feet following the regular line of travel. The auditor's room was, during the night time, brilliantly illuminated. (Tr. 66.)

According to the evidence, the last of the day's receipts were placed in the safe at about 10:20 o'clock on the evening of September 4, and were counted by the auditor and cashier and the safe door then closed and fully locked by the combination and the vault door was closed and auditor and cashier and the others connected with the accounting department then went home. (Tr. 40, 44, 46, 48.) The next morning, September 5th,

the vault door was found to be locked by the combination but upon opening same it was discovered that the safe door was open and the money was gone. At that time, no marks of any nature or kind of force, or violence, were found on the safe (Tr. 44, 49, 56), nor was there found any marks of force, or violence, explaining the means by which the vault door was opened. Later that day, it was found that a screw, connecting an arm that operated one of the bolts in the vault door, was missing, and there was some adhesive tape wrapped around one of the bolts of the vault door, and that the bolts of the vault door had been recently oiled. (Tr. 56, 59, 64, 77.) There was no explanation as to when these things were done, or whether they had any connection with the loss of the money, except that as to the oiling of the bolts, that usually anything of that sort would be ordered by the auditor and the work done by the caretaker; that the auditor had not ordered the bolts oiled and the caretaker had not oiled them. (Tr. 69, 70, 77.) The auditor, however, had on Tuesday, before the Fair opened, (6 days before the Fair opened) discovered the recent oiling of the bolts. (Tr. 70.) Two days after the loss of the money was discovered, there was found at one of the ends of the grandstand of the fair grounds a door, a part of which had been cut recently, by which it was claimed the ones taking the money got under the grandstand, and there was found in the board partition of the auditor's room a recently cut slide panel door by which it was thought entrance was effected to the

auditor's room. (Tr. 52, 59, 71, 72.) Although there were many of the fair officials, and employes, looking over the situation, and numerous police officers and detectives, investigating the loss, and trying to determine the facts at all times, and the fair officials, and detectives employed by Defendant in Error, were searching for some evidence that entrance was effected to the safe by actual force and violence, of which there were visible marks, so as to bring the loss within the protection of the policy, no marks of any nature or kind were found which it was claimed rendered the policy liable until the afternoon of September 24, 1924. (Tr. 44, 56, 60, 61, 65, 66.) On September 24, (19 days after the loss was discovered,) the auditor, the manager, an attorney and a safe expert went again to visit the premises, for the purpose of a final look over the situation, to see if visible marks of actual force or violence could be found. (Tr. 56, 57, 59, 65, 66.) When these four reached the fair ground, the attorney requested the safe expert to remove the combination of the safe. When this was done, the dial was removed and likewise the dial rim. (Tr. 56, 57.) The dial rim had to be picked off by the safe expert which indicated that it had been on for some considerable time. (Tr. 82, 90.) When the dial rim was removed a drilled hole was found under the dial rim, which dial rim concealed from the outside, the presence of the drilled hole, this drilled hole being one-fourth of the distance of the circumference to the right from zero. (Tr. 78, 82.) There was also discovered, at

the same time, quite a quantity of steel shavings lying on the platform on which the safe rested, and some were on the floor. (Tr. 58, 59, 61, 82.) We will show later that these steel shavings were not present on the morning when the loss was discovered. This drilled hole was 15-64ths of an inch in diameter. (Tr. 91.) The proof of claim presented was on the theory that entrance was effected to the safe by the drilling of this hole. The complaint was drawn on the same theory. (Tr. 3.) Defendant in Error's evidence was produced on the same theory until by cross examination, some of the fair officials had practically admitted that the hole was drilled prior to the loss at the direction of the Fair Association, (Tr. 62, 70, 78) whereupon Defendant in Error changed its theory and put on the stand one Elwood Larson, a safe expert, who testified that in the latter days of August, 1922, the Fair Association had lost the combination to the safe, and he was employed to open it and learn the combination. (Tr. 78.) That in doing this, he drilled this hole, necessarily ruining the dial rim in doing so; that he opened the safe, learned the combination, and then filled the drilled hole with a tapered steel plug driven fairly tight, (Tr. 78, 79, 95), put on a new dial rim to replace the ruined one, and reported the combination to the then manager, one Hannan, and two other men (Tr. 95, 96). No remains of this plug were found either in the combination chamber, or outside of the safe, (Tr. 87) and there was no evidence indicating that the tapered steel plug had ever been

drilled out, which would be manifest. (Tr. 86-88.) Upon putting the witness Larson on the stand Defendant in Error changed its theory, from a hole having been drilled by the ones who took the money, to the theory that the tapered steel plug, inserted in the hole, had been drilled out by such persons (Tr. 77-80), and still later changed its theory, upon it appearing that the plug could not have been drilled out, without leaving evidence of such fact, to the theory that the one taking the money had drilled a smaller hole into the plug and by this means had drawn the plug.

Plaintiff in error contended in the lower court, and still contends: (1) that there was no evidence of any felonious entry into the safe by any actual force or violence, or if that if there was any actual force or violence, there was no visible marks made upon such safe by tools, explosives, chemicals or electricity; (2) That the evidence conclusively established that any entrance to the safe was effected by the manipulation of the lock; (3) that the lower court committed error in refusing to give instructions requested and in the instructions given. That particularly it was error for the court to refuse to instruct the jury that the force and violence, if any, and the visible marks made, if any, must have been within the policy period, and it was error to instruct the jury in substance that, if the ones taking the money had prior to the policy period, through force or violence, obtained knowledge of the combination,

and then during the policy period had used such knowledge previously acquired to manipulate the combination, and open the safe and take the money, that that would create a liability under the policy.

SPECIFICATION OF ERRORS

1. The court erred in denying Plaintiff in Error's motion made at the time when the evidence was all in that the jury be instructed to return a verdict in favor of defendant. (Tr. 137-138.)

2. The court erred in refusing to give Plaintiff in Error's requested instruction 1 as follows:

> "I instruct you that under the evidence in this case defendant is not liable. And you will return a verdict in favor of said defendant."

3. The court erred in refusing to give Plaintiff in Error's requested instruction 4 as follows:

> "You are further instructed that if you should find by a preponderance of the evidence that the alleged burglar or burglars opened the door of the safe by the use of the manipulation of the combination lock on the safe, and in this manner was able to secure the money contained in the safe, that then your verdict should be in favor of defendant." (Tr. 154-155.)

4. The court erred in refusing to give Plaintiff in Error's requested instruction 5 as follows:

> "You are further instructed that if you should find that the alleged burglar or burglars

opened the safe door by the use of a key, or by the manipulation of the combination, your verdict should be in favor of defendant, even though you should find from the evidence that the alleged burglar or burglars obtained knowledge of the combination and how to manipulate it for the purpose of opening the door, through some fraud, or by the use of a hole made in the safe door by themselves or others." (Tr. 155.)

5. The court erred in refusing to give Plaintiff in Error's requested instruction 6 as follows:

"You are further instructed that unless you should find that a plug in the hole in the safe door under the rim adjoining the dial was removed by the alleged burglar or burglars, your verdict in this action must be for the defendant." (Tr. 155.)

6. The court erred in refusing to give Plaintiff in Error's requested instruction 7 as follows:

"You are instructed further that the policy of insurance on which plaintiff sues was effective commencing with noon on August 31, 1924, and up to and including September 10, 1924, at 12 o'clock noon. If you should find from the evidence that the alleged burglar or burglars removed a plug from the hole under the rim, and by means of said hole they were able to and did open the door of the safe, nevertheless, I instruct you to entirely disregard the existence of such hole, or the removal of any plug therefrom, unless you shall find by a preponderance of the evidence that said hole was bored by the burglar or burglars, or the plug was removed by such burglar or burglars between noon on August 31, 1924 and the time

of the discovery by the Fair Association that the safe had been opened, and the money taken." (Tr. 155-156.)

7. The court erred in refusing to give Plaintiff in Error's requested instruction 8 as follows:

> "You are further instructed that if any act or thing was done by the alleged burglar or burglars prior to noon, August 31, 1924, the date when the said policy became effective, for the purpose of burglarizing said safe, that no liability would attach, under the policy, for such act previously done, nor can you consider any such act for the purpose of creating or fixing a liability under the policy." (Tr. 156.)

8. The court erred in instructing the jury as follows:

> "I charge you that if you find from a preponderance of the evidence that some years previously to the entry into the safe referred to in the complaint a man employed by the plaintiff had drilled a hole in the door of the safe for the purpose of effecting an entry into it, and that after effecting such entry the hole was closed by a steel plug driven into it, and if you further find from such preponderance of the evidence that at the time, or previous to the time, of the entry referred to in the complaint the person or persons effecting such entry did so by drilling or of drawing out with tools the plug which had been previously driven into the hole in the safe door, and were thereby enabled to effect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe door by

reason of such drilling or drawing out of such plug was visible mark of force and violence made upon such safe within the terms and meaning of the policy." (Tr. 156-157.)

9. The court erred in instructing the jury as follows:

"As I have already said, the policy in suit covered the period from noon of August 31, 1924, to noon of September 10, 1924. The defendant cannot be held liable upon such policy unless the money which was taken from the safe, as referred to in the complaint, was abstracted from the safe during that period. However, if you find from a preponderance of the evidence that the money was taken from the safe during that period, under such circumstances as would render the defendant liable upon its policy, as these have heretofore been defined to you, then defendant is liable for the loss of the plaintiff caused thereby, although you should further find that the person or persons who effected the entrance into the safe and took the money therefrom during the policy period had previously to its commencement removed the plug from the hole in the safe door by drilling or drawing it out with tools, and thereby acquired a knowledge of the working of the combination by means of which they were subsequently and during the policy period able to effect an entrance into the safe and extract therefrom its contents." (Tr. 157-158.)

10. The court erred in instructing the jury as follows:

"If you find from a preponderance of the evidence that the person or persons who effected an entrance into the safe and took the money

therefrom as described in the pleadings and evidence, did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe door by means of which such person or persons were enabled to gain a knowledge of the working of the combination, and so to work the combination and open the safe door and take the money from the safe, then I charge you that defendant is not relieved from liability because of the final act of entering the safe was effected by working the combination on the safe door. If such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the plug in the safe door, and the person or persons so drilling or drawing out such plug thus obtained access to the combination and thereby were enabled to effect an entrance into the safe, the defendant is liable, if you find the other circumstances present which I have stated to you to be necessary to sustain its liability." (Tr. 158-159.)

11. The court erred in overruling Plaintiff in Error's motion for a new trial. (Tr. 159.)

12. The court erred in entering judgment in favor of Defendant in Error and against Plaintiff in Error. (Tr. 26.)

BRIEF OF ARGUMENT

1. Plaintiff in Error was entitled to a directed judgment for the following reasons:

(a) There was no testimony that entrance to the safe was effected by actual force and violence,

nor that there were any visible marks made upon said safe by tools, explosives, chemicals or electricity, by the one taking the money.

(b) In the absence of evidence to the contrary, it is presumed that an act has been rightfully done, and was not of a wrongful nature.

Alexander v. Fidelity Trust Co.,
249 Fed. (3rd Cir.) 1;

American Surety Co. v. Citizens National Bank, 294 Fed. (8th Cir.) 609;

Succession of Drysdale,
50 So. (La.) 30;

McLaughlin v. Bardsen,
145 Pac. (Mont.) 954;

U. S. Fidelity & Guaranty Co. v. Bank of Batesville, 112 S. W. (Ark.) 957;

City of Maysville v. Truex,
139 S. W. (Mo.) 390;

Capp v. City of St. Louis,
158 S. W. (Mo.) 616;

Nomath Steel Company v. Kansas City Gas Co., 223 S. W. (Mo.) 975;

Fried v. Olson,
133 N. W. (N. D.) 1041;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503.

(c) There were no circumstances proven, which would legally permit an inference to be drawn, that entrance was effected, by actual force and violence, nor that there were any visible marks made upon such safe by the one so entering.

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto 693; (25 L. Ed. 761);

Patton v. Texas & Pacific Railway Co., 179 U. S. 361; (45 L. Ed. 361);

Cunard S. S. Co. v. Kelley, 126 Fed. (1st Cir.) 610;

U. S. Fidelity and Guaranty Co. v. Des Moines Na't Bk., 145 Fed. 273;

U. S. v. American Surety Co., 161 Fed. (D. C.) 149;

Parmelee v. C. M. & St. P. Ry. Co., 92 Wash. 185 (158 Pac. 977);

Klumb v. Iowa State Traveling Men's Association, 120 N. W. (Ia.) 81;

Lopez v. Rowe, 57 N. E. (N. Y.) 501, 503;

Tibbits v. Mason City and Ft. D. R. Co., 115 N. W. (Ia.) 1021;

Shaw v. New Year Gold Mines Co., 77 Pac. (Mont.) 515;

Monson v. LaFrance Copper Co., 101 Pac. (Mont.) 243;

Chicago R. I. & P. Ry. Co. v. Rhoades,
68 Pac. (Kan.) 58;

In re Wallace Estate,
220 Pac. (Cal.) 682;

Albert v. McKay & Co.,
200 Pac. (Cal.) 83;

Ohio Building Safety Vault Co. v. Industrial Board, 115 N. E. (Ill.) 149;

Ohlson v. Sac County Farmers Mutual Fire Assurance Association, 182 N. W. (Ia.) 879;

Carr v. Donnet Steel Co.,
201 N. Y. Supp. 604;

Ford v. McAdoo,
131 N. E. (N. Y.) 874;

Spickelmier Fuel & Supply Co. v. Thomas,
144 N. E. (Ind.) 566;

St. Louis and S. F. R. Co. v. Model Laundry, 141 Pac. (Okla.) 970;

Spoon v. Sheldon,
151 Pac. (Cal.) 150;

Southern Ry. Co. v. Dickson,
100 So. (Ala.) 665;

Riley v. City of New Orleans,
92 So. (La.) 316;

Coolidge v. Worumbo Manufacturing Co.,
102 Atl. (Me.) 238.

(d) To establish the facts necessary for a recovery, inference must be drawn from inference. The inference must be drawn that the robber removed the steel plug; that having removed the steel plug, he, then, through the drilled hole, manipulated the combination so as to open the door, and in that manner learned the combination; that otherwise he was without knowledge of the combination, and, at the time he entered the safe for the purpose of taking the money, he was able to manipulate the combination, due to what he had learned through the drilled hole. Inference cannot be based on another inference.

United States v. Ross,
92 U. S. 281 (23 L. Ed. 707);

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto, 693 (25 L. Ed. 761);

Loone v. Metropolitan Railway Co.,
200 U. S. 480, (50 L. Ed. 564);

Smith v. Pennsylvania Railroad Co.,
239 Fed. (2nd Cir.) 103.

(e) There were no visible marks of tools, explosives, chemicals or electricity. (1) If there were any marks, they were on the steel plug, or it was the absence of the steel plug, which was not covered by the policy. (2) Under the policy the part of the outer door covered was limited to the "solid steel" exclusive of "bolt work." (3) A material misrepresentation of the condition of the door was

made in obtaining the policy, in that the outer steel door was not solid steel, and would not afford the resistance contemlpated.

(f) The entrance, by the robber to the safe, was effected by the manipulation of the combination and, therefore, the loss was not covered by the policy. The following are cases dealing with somewhat similar conditions:

New Amsterdam Casualty Co. v. Iowa State Bank, 277 Fed. (8th Cir.) 713;

Franklin State Bank v. Maryland Casualty Co., 256 Fed. (5th Cir.) 356;

First Na'tl Bank of Monrovia v. Maryland Casualty Co., 28 Am. & E. Ann. Cases, 1913-C, 1176 and notes, (121 Pac. 321);

Fidelity & Deposit Co. v. Panitz, 120 Atl. (Md.) 713;

Van Kuren v. Travelers Ins. Co., 108 S. E. (Ga.) 310;

Nahigan v. Fidelity & Casualty Co., 253 S. W. (Mo.) 83;

Frankel v. Mass. Bonding & Ins. Co., 177 S. W. (Mo.) 775;

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Blank v. National Surety Co., 165 N. W. (Ia.) 46;

Rosenthal v. Amer. Bonding Co.,
46 L. R. A. (N. S.) 561 and cases cited;

Feinstein v. Mass. Bonding & Ins. Co.,
183 N. Y. Supp. 785;

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. Supp. 309.

(g) If there was any force or violence, or any visible marks of tools, explosives, chemicals or electricity, it was at a time prior to the policy period, and not within the protection of the policy.

(h) The steel shavings found on the platform on which the safe rested, on Sept. 24, 1924, had no connection with the robbery; they were not present on the morning following the robbery.

(4) The District Court, improperly construed the policy, so as to permit a recovery where there was no force or violence, nor visible marks made, within the policy period. The insurance was for the limited period of ten days subsequent to August 31, 1924, noon, and if the alleged burglary was occasioned by felonious entry, by actual force and violence, such force and violence and visible marks made upon the safe by tools, explosives, chemicals or electricity, all was prior to the policy period. All of the necessary elements to constitute the burglary as defined were essential and must have occurred within the policy period.

32 C. J. p. 1148 Sec. 258,
9 C. J. p. 1096;

Northern Assurance Co. v. Grand View Bldg. Assn., 183 U. S. 308, 332 (46 L. Ed. 213);

Kentucky Vermillion L. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. (9th Cir.) 695;

Bench Canal Drainage District v. Maryland Casualty Co., 278 Fed. (8th Cir.) 67, 80;

Gilchrist Transp. Co. v. Phoenix Ins. Co., 170 Fed. (6th Cir.) 279, 281;

Frankel v. Mass. Bonding & Insurance Co., 177 S. W. (Mo.) 775;

Rosenthal v. American Bonding Co., 46 L. R. A. (N. S.) 561;

Hartford Fire Insurance Co. v. Wimbish, 78 S. E. (Ga.) 265;

Stich v. Fidelity & Deposit Co., 159 N. Y. Supp. 712;

Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576 (156 Pac. 557);

Bank of Monrovia v. Maryland Casualty Co., 28 Am. E. Ann. Cases, 113-C, p. 1176 and notes.

Blank v. National Surety Co., 165 N. W. (Ia.) 46.

(5) Error was committed in refusing to instruct the jury that there could be no recovery if entrance was effected by the manipulation of the combination lock. In any event, it was error to instruct the jury that entry by the manipulation of the combination lock would only defeat a recovery where "actual force and violence" was not employed.

(6) Error was committed in refusing to instruct the jury that there could be no recovery unless the robber removed the tapered steel plug. If there could be on any theory a recovery, it would have to be based upon the removal of this plug and the jury should have been so instructed.

(7) Error of the court in denying the petition for a new trial and in entering judgment.

ARGUMENT
UNDER THE PLEADING AND EVIDENCE PLAINTIF IN ERROR WAS ENTITLED TO A DIRECTED JUDGMENT

Specifications of Error I and II

Even, if the District Court's construction of the policy of insurance, as shown by its instructions and its refusal to instruct, which specifications of error will be discussed later, should be sustained, nevertheless Plaintiff in Error submits that the evi-

dence did not warrant the submission of this case to the jury, and Plaintiff in Error was entitled to an instructed verdict.

There was no evidence that the money was taken from the safe by anyone through making a felonous entry into such safe by actual force and violence, nor was there any evidence that there were any visible marks made upon such safe by tools, explosives, chemicals or electricity by the ones taking the money. Nor was there any evidence from which the jury could draw an inference that entrance to the safe was effected in that manner. In fact, if the evidence was such as to permit any inference whatever to be drawn on the subject, it was an inference that the entrance was not effected in the manner necessary to bring the loss within the protection of the policy, and there were no visible marks of a violent entry. If our position in this regard is correct, then the verdict in favor of Defendant in Error could only be the result of speculation and guess.

We believe, the whole basis for any contrary contention, which defendant in error might make, is this: That when Elwood Larson, the safe expert, at the request of Defendant in Error, in the latter days of August, 1922, drilled the hole in the safe door, for the purpose of opening the safe, he put into the hole a tapered steel plug driven in fairly tight (Tr. 79, 95); that on the afternoon of September 24, 1924 (19 days after the loss of the money

was discovered) the tapered steel plug was no longer in the hole. There is no evidence bearing upon the removal of this plug from the hole; there is no evidence that the plug was in the hole at any particular time between the day in August, 1922, when Larson placed it there, and September 24, 1924; nor is there any evidence creating any basis for an inference that the plug was in the hole at any time shortly before the night of September 4, when it is claimed the money was taken, nor that the plug was not in the hole on the morning of September 5, when the loss of the money was discovered. The record is entirely silent on these points, there being present nothing of any evidentiary nature favorable to Defendant in Error, except that the money disappeared on the night of September 4, and the further fact that the plug was in the hole on the last days of August, 1922, and was not in the hole on the afternoon of September 24, 1924. If we are correct in our above statement as to the condition of the record, there is here no circumstantial evidence from which an inference might be drawn, that the ones taking the money gained knowledge of the combination by removing the plug, and were thus enabled to open the safe.

In making the above statements, we have not overlooked the drill mark on the carrier tumbler, which was greatly relied upon by Defendant in Error in the early part of the trial. (Tr. 81, 83), which drill mark Larson testified, on cross examina-

tion, was probably made by him (Tr. 96) and which drill mark Defendant in Error's expert witness Corey admitted, on cross examination, could not have been made by anyone who was drilling, or attempting to drill, out the plug (Tr. 97) and which drill mark the District Court withdrew from the consideration of the jury, so far as there was any claim that it constituted a visible mark of force or violence. (Tr. 145.)

Nor are we overlooking the fact that on the afternoon of September 24, when it is claimed this drilled hole was discovered by the Fair Association, (the Fair Association, of course, had known of the hole ever since Larson had drilled it in August, 1922),) there was a quantity of steel shavings on the platform on which the safe stood, and on the floor below. If these steel shavings could have been of any importance, under any theory, as forming any basis for an inference that entrance to the safe by the ones taking the money was effected through this drilled hole, which we think they could not, nevertheless there was no evidence that these shavings were present on the morning of September 5, when the loss of the money was discovered, and it is quite conclusively established that they were not then present. If they were not present, immediately following the time when the money was taken, then it is manifest that the steel shavings have no important bearing. The evidence dealing with the steel shavings will be considered more at length hereafter.

What we have said above is directed solely to any evidence of a circumstantial nature, or rather evidence on which it might be claimed the jury were entitled to draw the inference, that entrance was effected to the safe, by the ones taking the money, through the drilled hole. There was, however, other evidence which would compel the inference, if any inference at all could be legally drawn, that the drilled hole played no part whatsoever in the loss of the money, and which compels the inference that entrance was effected to the safe by the ordinary method, namely, the manipulation of the combination alone, and such other evidence will be now considered.

NO EVIDENCE OF FORCE OR VIOLENCE NOR OF VISIBLE MARKS

The discovery on September 7, 1924, of the door cut in the grandstand, and the door cut in the partition of the auditor's office, (Tr. 52, 59, 71, 72,) we think plays no part in determining the question as to whether force, or violence, was used in entering the safe, and whether there were any visible marks on the safe of force and violence. They have some bearing upon whether, if there was force or violence, such force or violence was within the policy period, and this feature will be considered more fully later. Nor do such entrances to the grandstand, and to the auditor's office, even tend to prove that the money

was taken by some one other than people connected in some manner with Defendant in Error. Whether the money was taken by professional yeggmen, or by some one connected with the Fair Association, in either situation, a means of ingress and egress similar to these doors was absolutely essential. A number of employes of the Fair Association were at all times in a nearby room, near which anyone going to, or from, the vault where the safe was located, would be required to pass. Without such a method, as devised, the ones who would be carrying out the money would be compelled to pass through the brilliantly lighted auditor's room (Tr. 66) and through the open spaces, which would render it nearly impossible for them to escape detection. There were seven sacks of silver, each sack containing $500, and considerable additional loose silver. This alone would necessitate several trips to and from the vault. No matter who it was that planned to take the money, a method of getting into and from the vault without detection had to be devised. There is a reason why it is scarcely conceivable, that the money was taken by anyone other than some one, who knew what was transpiring in the auditor's room, unless there was a confederate who was kept informed as to what was taking place in the auditor's room. The construction of this door, under the grandstand, was something that might have attracted attention before the money was taken. The construction, of the door into the auditor's room, was a change which would probably be quickly discovered by the Fair Association,

particularly the placing the 2x4 on the inside of the auditor's room, which concealed the sawed boards, (Tr. 64) was a general change, which it might be expected, would be noticed. Especially where one is contemplating a crime, they would be very apprehensive on the subject. The removal of the screw which connected one of the arms to one of the bolts in the vault door, the placing of adhesive tape around one of these bolts, and the fresh oiling of the bolts of the vault door, all of which was perfectly open to sight, would probably be quickly discovered. In fact the auditor, Mr. Reinhard, did on Tuesday, before the Fair opened, discover the fact that these bolts had been freshly oiled. (Tr. 70.) It is scarcely conceivable that a professional, or any burglar, having prepared this situation, would have passed through this hole in the grandstand, this hole in the partition of the auditor's room and into the vault, had he not known that none of these things had been discovered by the Fair Association. He would know, that if any of these things were discovered, the Fair Association would realize at once that a robbery was planned, and that officers would be lying in wait for the purpose of trapping him. He would know that, if any of these things had been discovered, and, he should enter the auditor's office, he would certainly be captured and there would be no possibility of making an escape. Therefore we say, it is inconceivable, that, if the one who took the money, entered the auditor's office, passing through these two doors, he did so without knowing that none of these things

had been discovered. Therefore, he must have been some one closely enough connected with the auditor's office, so as to be advised as to what was known by the ones in that office, or he must have had a confederate who was so advised.

The only evidence, in the record which would tend to create any inference whatsoever, as to whether the ones taking the money obtained access to the safe, by drawing out the tapered steel plug from the drilled hole, is unfavorable to Defendant in Error's contention.

In the first place, so far as the record discloses, there was no occasion for the one taking the money to gain a knowledge of the combination through the drilled hole. The combination to the safe was known by the president, Mr. Griffith, the manager, Mr. Semple, the auditor, Mr. Reinhardt, a former manager, Mr. Hannan, and Mr. Nettleton. (Tr. 69.) It was also known by Elwood Larson, who learned the combination in August, 1922, and communicated it to Mr. Hannan and two other persons. (Tr. 96.) Who these other two persons were, the record does not disclose. None of the persons testified that they had not communicated the combination to others. The combination might be obtained by one desiring so to do in a number of ways without using force or violence on the safe. Mr. Reinhardt had the combination numbers on a card, or in a pocket memorandum book, which he always carried in his pocket

(Tr. 70), and which apparently had been lost before the time Elwood Larson was employed to open the safe. It would have been a perfectly easy matter for one desiring so to do to have taken this card, or book from Mr. Reinhardt's pocket, learned the combination, and returned the same to the place from which it was obtained, or possibly failed to return it, with the result that Larson had to be called upon to open the safe. It is entirely possible that, if the card or book in which the combination was kept was lost, that robbers found it and thus learned the combination. When Larson had opened the safe he left the door open while he went back to town to get a new dial rim and the tapered steel plug (Tr. 95.) With the safe door open it would be an easy matter for one to learn the combination in a few minutes. (Tr. 89.) One could learn the combination by watching another open the safe while standing a few feet distant. Larson was not certain but that he left the safe unlocked when he left finally, (Tr. 95.)

That the door was opened at the time the money was taken by the manipulation of the combination cannot well be doubted. The only theory of Defendant in Error is, that, the one so opening the door, by the use of the combination, had acquired knowledge of the combination, through this drilled hole; and yet there is not, as we read the record, the slightest thing on which to base any such inference.

The combination could be obtained, although

probably requiring a long time by experimenting with and manipulating the combination knob. (Tr. 99, 100.)

Except during fair week, and for a short time prior thereto, the fair grounds are very nearly deserted. (Tr. 68.) There was, therefore, an opportunity for anyone contemplating robbing the safe to make the preparations necessary for that purpose. During fair week, and for a number of days prior thereto, there were many people around the grounds, which would render it difficult, if not impossible, to then make this preparation. (Tr. 68.) The preparations, in making these doors to the grandstand and auditor's office, opening the vault door, and working with the bolts on the inside of the vault door, required considerable time, and this could not well have been done during fair time, or for a considerable number of days before that without discovery. Therefore there was no occasion to remove this steel plug, if it was still in the safe. That this preliminary work was done, before the fair opened, is established by direct evidence, in that Mr. Reinhardt discovered, that, the mechanism of the vault door had been oiled recently, the Tuesday before the fair opened. (Tr. 70.)

That it was not necessary, for the ones committing the crime to use force and violence, is established by the direct evidence, introduced by Defendant in Error. The vault door was locked by a com-

bination lock. (Tr. 44, 46, 48.) This vault door was closed and the combination completely thrown at the time the auditor's office force left on the night of September 4, 1924 (Tr. 46.) The vault door was found locked on the morning of September 5, 1924, when Mr. Reinhardt arrived. (Tr. 48.) There were no marks, of any nature or kind on the vault door, explaining how the door was opened, and entrance to the vault could only have been made by the ordinary manipulation of the combination. (Tr. 49, 56.) Notwithstanding, the ones who robbed the safe, knew the combination to the vault door, and did not have to resort to force or violence in learning such combination, yet Defendant in Error asks, that, the jury should be permitted to infer that the robber did not learn the combination to the safe door, except through force and violence. That the safe door was opened, at the time the robbery was committed, was established by the direct evidence, that when Mr. Reinhardt opened the vault on the morning of September 5, 1924, the safe door was then open and the bolts thrown in the way they should be when the combination had been probably used. (Tr. 47.)

Other facts, strongly indicating that no force or violence was used in acquiring the combination to the safe by the robbers are the following: This drilled hole is under the dial rim (Tr. 95); the presence of such drilled hole could only be known by removing the dial rim or by turning it back with a pair of pliers. (Tr. 95.) The dial rim could not be re-

moved without opening the door removing the combination and the combination knob. After so doing the screws holding the dial rim would be exposed and the dial rim could then be removed. (Tr. 80, 82.) It is, of course, true that if this was done, then the robber effected entrance to the safe, before he could have any knowledge of the existence of the drilled hole. If the robber attempted to drill a hole for the purpose of picking the combination, there was no occasion for him drilling such hole where it would touch the dial rim at all. The quickest and best way was to drill the hole directly, and just above, the dial rim. (Tr. 79.) The only objection to this method was that it would mar the safe more and could not be as well covered up. (Tr. 95.) The robber, however, was not interested in this. There was no effort to conceal the fact that entrance had been effected to the safe and everything of value therein taken.

The only answer to this is that the preliminary plans to get into the safe were made at a prior date, and before the fair opened and before the policy period. Therefore, assuming that the robber did any work preparatory to the robbery, before the fair opened, we are confronted with this situation: He knew nothing about the existence of the already drilled hole, nor the presence of a plug, if there was a plug. He drills through the dial rim, and to the steel underneath, and leaves not the slightest mark upon the steel door underneath. These facts could

not exist, unless he exactly centered the plug underneath. He could not know that a hole had been previously drilled and filled with a plug without making a careful examination through the hole which he would drill in the dial rim and that such an examination would be made is very improbable. The natural thing to do, if it was necessary for him to get a start for his drill, when it struck the steel of the safe door, was to make the necessary indentation without attempting to examine the nature of the plate which he intended to drill through.

Defendant in Error's expert admitted that the exterior, where this drilled hole appeared, did not show any evidence that a second drilling had occurred (Tr. 86, 87, 88); that the tapered steel plug could not be drilled out with the same sized drill without leaving evidence of such fact on the outside (Tr. 88), and that evidence of the use of the second drill would be found on the walls of the hole, (Tr. 87) and that when the drill had entered a short distance the plug would begin to turn and would then have to be pushed in (Tr. 86, 96) and that the remains of the plug would interfere with the manipulating of the combination or getting knowledge of the combination through the hole. (Tr. 93.) That the only way in which access could be obtained to the combination through this hole, if it was plugged, was by drilling into the plug with a smaller drill and then pulling the plug out. (Tr. 86.) Otherwise evidence of the second drilling would be present. (Tr.

87, 88.) From this it follows that the robber had to go prepared with two sized drills, one in contemplation of drilling a hole through, and a smaller drill in contemplation that he would find a plug there which he would have to draw. That after drilling through the dial rim, he examined the surface of the safe through this hole, for the purpose of discovering what the conditions were, (all of which was unnecessary) and having done so, discovered that a hole had already been drilled, and plugged, and he thereupon proceeded to perform his purpose in such a way so as to leave no evidence of the drilling. That this robber then proceeded to obtain a new dial rim since the old one necessarily was ruined. He removes the combination, dial knob and old dial rim, puts on a new dial rim, and replaces the combination, all of which was unnecessary if he was to obtain entrance in a forcible manner to the safe. All that he needed to do, if force was necessary, was to take his drill with him the night of the robbery and after having gotten into the vault, drill his hole at the top, the easiest and quickest place, open the safe, get the money and go.

Another fact, which tends to negative that the plug was removed by the robber, is that some one for some purpose, after the money was taken, and before the drilled hole was discovered, (?) scattered steel shavings on the platform on which the safe rested. By whom this was done, and the purpose of the act, is not disclosed by the record. It apparently was in-

tended to create the impression, that, these steel shavings had some connection with the drilled hole. It is possible, that the one who took the money, finding that suspicion was directed toward some one connected with the Fair Association, sought to create evidence to indicate that it was an outside job.

If this tapered steel plug was removed, by the one who intended to rob the safe, such person was committing a crime in so doing. If it was removed by some one who had authority so to do, a crime was not committed. In the absence of evidence to the contrary, it is presumed that an act has been rightfully done, and that the act was not of a wrongful nature. There is always a presumption against crime or wrong.

Alexander v. Fidelity Trust Co.,
249 Fed. (3rd Cir.) 1;

American Surety Co. v. Citizens National Bank, 294 Fed. (8th Cir.) 609;

Succession of Drysdale,
50 So. (La.) 30;

McLaughlin v. Bardsen,
145 Pac. (Mont.) 954;

U. S. Fidelity & Guaranty Co. v. Bank of Batesville, 112 S. W. (Ark.) 957;

City of Maysville v. Truex,
139 S. W. (Mo.) 390;

Capp v. City of St. Louis,
158 S. W. (Mo.) 616;

Nomath Steel Company v. Kansas City Gas Co., 223 S. W. (Mo.) 975;

Fried v. Olson,
133 N. W. (N. D.) 1041;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503.

In the above cases the principle has been applied under various circumstances and conditions. Thus in the Alexander case the syllabus is "where the act of a party may refer indifferently to one or two motives, the law prefers to refer it to that which is honest rather than to that which is dishonest."

In the American Surety Company case the syllabus is "until there be reasonable ground to think otherwise, a presumption prevails that one acts honestly and keeps within the requirements of the law."

There is some difference, in the decision from the various courts, as to what is necessary in order that a court, or jury, may draw an inference which is necessary for the purpose of sustaining a judgment. The test has been stated: (1) Inferred fact must have an immediate connection with, or relation to, the established fact; (2) Where one of several inferences may be reasonably drawn, jury may not speculate which to accept; (3) Inference sought to be drawn must be established to exclusion

of any other. It must be the only theory or conclusion which may be fairly, or reasonably drawn; (4) Where an inference may be drawn equally consistent with non-liability, as with liability, the evidence tends to prove neither; (5) The facts from which the inference is sought to be drawn, must be inconsistent with any other rational conclusion; (6) Conclusion must be the only one which can be fairly or reasonably drawn; (7) The facts from which the inference is sought to be drawn must exclude any other hypothesis, and possibility is not sufficient.

It is not necessary to segregate the different decisions, since the facts in this case do not bring it within any rule announced, by which the jury would be permitted to say, as an inference from the other facts proven, that this tapered steel plug was removed by the burglar, and in that manner he obtained the combination. It could not be found in this case that the robber removed this steel plug, nor that he obtained knowledge of the combination through the removal of the steel plug, except as the result of pure guess and speculation. There is nothing to it but guess and speculation and a poor guess at that. All cases agree that there must be evidence establishing the material facts, either direct or circumstantial, and that such facts cannot be established through guess and speculation. The mere possibility that the facts exist is not sufficient.

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto 693; (25 L. Ed. 761);

Patton v. Texas & Pacific Railway Co.,
179 U. S. 361; (45 L. Ed. 361);

Cunard S. S. Co. v. Kelley,
126 Fed. (1st Cir.) 610);

U. S. Fidelity and Guaranty Co. v. Des Moines Nat'l Bk., 145 Fed. 273;

U. S. v. American Surety Co.,
161 Fed. (D. C.) 149;

Parmelee v. C. M. & St. P. Ry Co.,
92 Wash. 185 (158 Pac. 977);

Klumb v. Iowa State Traveling Men's Association, 120 N. W. (Ia.) 81;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503;

Tibbits v. Mason City and Ft. D. R. Co.,
115 N. W. (Ia.) 1021;

Shaw v. New Year Gold Mines Co.,
77 Pac. (Mont.) 515;

Monson v. LaFrance Copper Co.,
101 Pac. (Mont.) 243;

Chicago R. I. & P. Ry. Co. v. Rhoades,
68 Pac. (Kan.) 58;

In re Wallace Estate,
220 Pac. (Cal.) 682;

Albert v. McKay & Co.,
200 Pac. (Cal.) 83;

Ohio Building Safety Vault Co. v. Industrial Board, 115 N. E. (Ill.) 149;

Ohlson v. Sac. County Farmers Mutual Fire Assurance Association, 182 N. W. (Ia.) 879;

Carr v. Donnet Steel Co., 201 N. Y. Supp. 604;

Ford v. McAdoo, 131 N. E. (N. Y.) 874;

Spickelmier Fuel & Supply Co. v. Thomas, 144 N. E. (Ind.) 566;

St. Louis and S. F. R. Co. v. Model Laundry, 141 Pac. (Okla.) 970;

Spoon v. Sheldon, 151 Pac. (Cal.) 150;

Southern Railway Co. v. Dickson, 100 So. (Ala.) 665;

Riley v. City of New Orleans, 92 So. (La.) 316;

Coolidge v. Worumbo Manufacturing Co., 102 Atl. (Me.) 238.

There are many other cases which we might cite, where the same principles have been discussed, as in the cases cited above, but we have confined ourselves to a few.

In the Manning case it is said:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with, or rela-

tion to, the established fact from which it is inferred. If it has not, it is regarded as too remote."

In the Patton case it is said:

"That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence, the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

United States Fidelity & Guaranty Co. v. Des Moines National Bank, *supra*, is a very well considered case, and discusses the question at considerable length. It is said:

" Passing for the moment the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employes to whom the money in its exposed condition was easily accessible as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reason-

> ably tending to establish the latter theory to the exclusion of the other, the Guaranty Company was entitled to a directed verdict in its favor."

Proceeding further, and after citing a number of cases, the court quotes with approval from Ashback v. Chicago, etc. Ry. Co., 37 N. W. 182, as follows:

> "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory for that may be true and yet they may have no tendency to prove the theory."

In United States v. American Surety Company, *supra*, it is said:

> "In meeting the burden of proof in this case it is not enough for plaintiff to show that the wrong complained of might have been occasioned by the default of Hammel, that he was pilfering from the mails and had the opportunity to take the things of value contained in the 120 letters. When the plaintiff produces evidence that is consistent with an hypothesis that the defendant is not liable and also with one that it is, his evidence tends to establish neither."

The last mentioned case went to the Circuit Court of Appeals (163 Fed. 228). This part of the decision of the lower court was affirmed but the case was reversed on other grounds.

In the Parmelee case this question has been carefully considered. Many decisions from both the Washington Supreme Court and other courts are discussed. The court says:

> "It is just as possible that deceased came to his death by some cause other than the negligence of the respondent as that he came to his death through such negligence. Possibility cannot be pyramided on possibility to make a chain of evidentiary circumstances. It is not a possible theory, but inferences from facts reasonably ascertained which impels. It is that conclusion to which the mind will inevitably return when it weighs the circumstances for either side, and will say, not arbitrarily, but as a result of due deliberation and a measuring of all the facts, that the proximate cause of the incident is to be found in the negligent conduct of the party charged. This is but another statement of the primary rule of circumstantial evidence; that is, that not only should the circumstances all concur to show that the thing charged happened in a particular way, but that they are inconsistent with any other rational conclusion."

In the Klumb case it is said:

> "It is a general rule in determining whether the circumstances relied upon furnished any evidence whatever of the conclusion sought to be drawn therefrom that the facts which the evidence tends to establish must be of such nature and so related to each other that the conclusion is the only one that can fairly or reasonably be so drawn. It is not sufficient that they are consistent with such conclusion if they are equally consistent with some other conclusion."

The New York Court of Appeals and Supreme Court of New York, have passed upon similar questions many times and have always been consistent in their decisions. We have cited but two. In the Lopez case it is said:

> "While a material fact may be established by circumstantial evidence, still to do so, the circumstances must be such as to fairly and reasonably lead to the conclusion sought to be established, and to fairly and reasonably exclude any other hypothesis. Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act that meaning must be ascribed to it which accords with its absence. In other words it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. 'As has been said insufficient evidence is in the eye of the law no evidence.' "

In the Tibbitts case it is said:

> "The casual connection between the injury and the negligence of the defendant may be proved by direct or circumstantial evidence, but the evidence, such as it is, must be something more than consistent with the plaintiff's theory of how the accident occurred. It must be such as to make that theory reasonably probable, not simply possible."

In the Shaw case it is said:

> "If the testimony leaves either the existence of negligence of defendant, or that such negligence was the proximate cause of injury, to con-

jecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven it does not tend to prove them, within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint and not some other theory inconsistent therewith."

In the Monson case it is said:

"The cuts and bruises on the face do not appear to have been mortal. The fact that they were there and that there was blood on the timber is as consistent with the idea that the deceased died a natural death as that he was killed by being caught between the cage and the timbers or by a cage or by a fall. * * * Any other conclusion upon such evidence would be a determination of the rights of the parties upon speculative and conjectural inferences, which is not permissible."

In re Wallace Estate case it is said:

"But unless this hypothesis be the only one which fairly and reasonably accords with the known circumstances of the case, as shown by the evidence, it cannot be said to be established as an inference from the proved facts. For, as we have shown, it is not sufficient that the circumstances of the case be consistent with respondent's theory. They must be inconsistent with any other reasonable theory equally deducible therefrom."

In the Albert case it is said:

"Resting on circumstantial evidence, the plaintiff's case is not sufficient merely because the circumstances proved are consistent with the plaintiff's theory; but the circumstances must show, when weighed with the evidence opposed to them, that the circumstances relied upon have more convincing force, substantiating the theory contended for, and from which theory it results that the greater probability is in favor of the party upon whom the burden rests."

In the Ohlson case it is said:

"The evidence relied upon by the appellee is wholly circumstantial, and in our judgment falls far short of the requirement of the established rule that even in a civil action, an allegation cannot be said to have been proved by circumstantial evidence, unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be merely consistent with the allegation."

In the Ford case it is said:

"When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

In the Spickelmier Fuel and Supply Co. case it is said:

"These decisions state the rule correctly, but it should be borne in mind that an inference to serve such purpose must be reasonable, and must be drawn from facts which the evidence tends to establish. They cannot be ar-

bitrarily drawn, but judgment must be exercised in so doing in accordance with correct and common modes of reasoning."

In the St. Louis & S. F. R. Co. case, the ninth syllabus is as follows:

> "An inference from testimonial evidence is permissible to the jury when, and only when it is a probable or natural hypothesis or explanation of such evidence, and when the other hypothesis or explanation are either less probable or natural or at least not exceedingly more probable or natural."

In the Southern Railway Company case the court quotes with approval from another case as follows:

> "Proof which goes no further than to show that an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur where from the same proof the injury can with equal probability be attributed to some other cause."

We can see no escape from the conclusion, that there was nothing in this evidence, from which an inference could be drawn, that the one committing the robbery removed the tapered steel plug, nor that he learned the combination, or effected an entrance into the safe, through the drilled hole. There simply, as we view it, is nothing in the record which would reasonably lead to any such conclusion, much less meet the tests as announced in the cases cited above. Not only is this true, but the facts proven are

strong in creating an inference that the robber entered in the usual way, with the knowledge of the combination, and without disturbing the steel plug, nor resorting to the drilled hole. The verdict in the case could only be the result of guess and speculation.

There is, however, a legal barrier to this claim that by circumstantial evidence, liability under the policy has been established. It is the universal rule that an inference cannot be pyramided on inference, nor presumption on presumption. To establish a fact by circumstantial evidence, the inference must be drawn from an established fact.

A leading case on this point is United States v. Ross, 92 U. S. 281 (23 L. Ed. 707), where it is said:

> "Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves be presumed."

In Manning v. John Hancock Mutual Life Ins. Co., 10 Otto, 693 (25 L. Ed. 761), the court says:

> "A presumption which a jury may make is not a circumstance in proof and is not therefore a legitimate foundation for presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

In Loone v. Metropolitan Railway Co., 200 U. S. 480, (50 L. Ed. 564), it is said:

> "But the negligence of the defendant cannot be inferred from the presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also:

Smith v. Pennsylvania Railroad Co.,
239 Fed. (2nd Cir.) 103.

It was necessary, if an inference could be drawn at all, that there should be several inferences, viz., that the robber removed the steel plug, that having removed the plug, he through the drill hole manipulated the combination so as to open the door, and in that manner learned the combination; that later, without the knowledge of the combination obtained in any other manner, he opened the safe and took the money.

NO VISIBLE MARKS OF TOOLS, EXPLOSIVES, CHEMICALS OR ELECTRICITY

The theory, of Defendant in Error, must be that the visible marks, made by the robber in effecting an entrance into the safe by tools, explosives, chemicals or electricity, is the claimed fact that there was a steel plug in this drilled hole which was no longer there on September 24, 1924. There is no

suggestion of any evidence, of any other mark, of any nature, or kind, especially since the court withdrew from the jury any evidence as to the drill mark on the carrier tumbler. (Tr. 145.) Therefore, the claimed visible mark is the absence of the plug. This might be compared to the situation, which would exist, if the robbers had carried the safe away, and action then had been brought on the policy. The disappearance of the safe would be treated as the equivalent of visible marks of force and violence with tools, explosives, chemicals or electricity. It is preposterous to talk about the absence of this steel plug being a visible mark of force and violence, and still more preposterous to consider it from the standpoint of a visible mark of tools, explosives, chemicals or electricity. There is nothing visible in the way of a mark of any nature, nor is there anything visible showing the use of any tools, explosives, chemicals or electricity. The plug did not even constitute a part of the safe. It was simply the insertion of something into the hole. When it was removed, the safe was as it had been before. It was the safe and its contents, which Plaintiff in Error insured, not the tapered steel plug.

The policy provides that the statements in the declarations "are declared by the assured to be true. This policy is issued in consideration of such statements and the payment of the premium in the Declarations expressed." In the Declarations it is provided, "the safe or safes are described and desig-

nated as follows: *** (d) thickness of solid steel in outer safe door, exclusive of bolt work (d) 1-4 inches." The Insurer was accepting a certain limited liability. It was of the utmost importance that it should know the character of the safe, and the resistance which it offered against burglary. The low premium, naturally, was based upon such resistance. It was not the intention to insure a safe which could be easily entered. It might with equal propriety be contended, that if the safe offered no greater resistance than a dry goods box, then entrance to such safe would be within the protection of the policy. When the words "solid steel" are used, the language means just that. This is made manifest by the exception, "exclusive of bolt work." In other words, this outer door was to present a solid resistance to invasion of burglars to the extent of ¼" of steel in thickness, exclusive of the hole for bolt work. The theory of Defendant in Error is that this outer door did not have ¼" thickness of solid steel, due to the fact that the hole had been drilled and was filled with a tapered steel plug driven in fairly tight; that the resistance of the safe to the burglar was overcome due to this fact.

To say, therefore, that with this misrepresentation in the policy, which was most material, that the policy can be extended to cover the part of the door which was not "solid steel", is to reward the insured for the misrepresentation made. The policy did not cover the plug, the plug was not a part of a solid

steel outer door and the entrance to the safe was not effected through any part of the solid steel.

If this court should hold that the alleged removal of the steel plug would constitute a visible mark of tools, explosives, chemicals or electricity, nevertheless, Defendant in Error has itself presented the testimony showing the representation made, on which the policy was issued, and the falsity of such representation. That the representation was, as a matter of law, most material we think cannot be questioned. The outer door did not offer the resistance, which was one of the considerations for the issuance of the policy, and due to this weakness Defendant in Error is now claiming it sustained the loss claimed.

ENTRANCE EFFECTED TO SAFE BY MANIPULATION OF COMBINATION

Another reason, why judgment should be directed in favor of Plaintiff in Error, is, that irrespective of whether the one who took the money obtained knowledge of the combination, through the use of the drilled hole, the fact still remains that the entrance to the safe was effected by the manipulation of the combination lock. The robber entered in the regular way. The policy provides that the company shall not be liable if entrance was "effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock."

It is of no importance, we take it, how the robber obtained knowledge of the combination whether in a proper way, or in a wrongful way. The fact remains that he had the combination and was able to open the door of the safe by the use of the combination. Somewhat similar questions have arisen where the robber has forced the one having the combination, to communicate the numbers to him, to open the safe, or in some similar manner, has forced an entrance to the safe or other place covered by the policy, without using tools or explosives, or leaving visible marks.

New Amsterdam Casualty Co. v. Iowa State Bank, 277 Fed. (8th Cir.) 713;

Franklin State Bank v. Maryland Casualty Co., 256 Fed. (5th Cir.) 356;

First Nat'l Bank of Monrovia v. Maryland Casualty Co., 28 Am. & E. Ann. Cases, 1913-C, 1176 and notes, (121 Pac. 321);

Fidelity & Deposit Co. v. Panitz, 120 Atl. (Md.) 713;

Van Kuren v. Travelers Ins. Co., 108 S. E. (Ga.) 310;

Nahigan v. Fidelity & Casualty Co., 253 S. W. (Mo.) 83;

Frankel v. Mass. Bonding & Ins. Co., 177 S. W. (Mo.) 775;

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Blank v. National Surety Co., 165 N. W. (Ia.) 46;

Rosenthal v. Amer. Bonding Co., 46 L. R. A. (N. S.) 561 and cases cited;

Feinstein v. Mass. Bonding & Ins. Co., 183 N. Y. Supp. 785;

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. Supp. 309.

ANY FORCE OR VIOLENCE, OR VISIBLE MARKS MADE PRIOR TO POLICY PERIOD

Another reason is that the evidence can only lead to one conclusion, and that is that the one who robbed the safe made his preparations and plans at a time prior to the policy period. Every particle of evidence, which evidence we have discussed above, points that way and there is no evidence that any of these things were done during the policy period, except to take the money. The District Court instructed the jury in substance that, if force and violence were used, and the visible marks made, prior to the policy period, and if by using this information, the robber during the policy period entered and took the money, that the policy was liable.

It will be necessary for us to discuss this feature of the case, more at length, later in dealing with the instructions given by the court, and refusal of the court to instruct. If the District Court erred in this construction of the policy, then we think it is

manifest that, whether there is, or is not, evidence in the record, of force and violence, and whether there is or is not any evidence of visible marks, that nevertheless all these things occurred prior to the policy period, and the policy is not liable.

There is no evidence, either direct or circumstantial, that the door cut in the grandstand, the door cut in the auditor's room, the placing of the tape, the removal of the screw connecting the arm to one of the bolts, or the oiling of the bolts of the vault door, or the removal of the tapered steel plug, from the drilled hole in the safe door, by the robber, if any inference can be drawn, that it was removed by the robber, were any of them done after the commencement of the policy period, August 31, 1924, noon. All of the evidence, in the case, points to the fact that, if any of these things were done by the robber, it was at a time prior to the commencement of the policy period. There is the direct evidence of Mr. Reinhardt, that the oil on the vault mechanism, was discovered by him on the Tuesday, prior to the opening of the fair, which would be five days prior to the commencement of the policy period; (Tr. 70) the direct testimony of Mr. Corey that the dial rim had been in place for a considerable time. (Tr. 82, 90.) The nature of these things which were done, was such as to indicate that they would consume considerable time, cause considerable noise, and would most probably be discovered, if there were others in the vicinity. The character of the things done re-

quired that there should be an opportunity to work unmolested, and without fear of discovery. During the year, outside of two weeks before the fair opened, there was nobody on the fair grounds but the caretaker (Tr. 68.) Commencing with two weeks before the fair opened there were many people on the grounds day and night. (Tr. 68.)

The burden of proof was on Defendant in Error to establish its case. There was nothing in the record from which an inference could be drawn, that any of these things occurred during the policy period. All facts indicate the contrary. If, therefore, it was necessary that the force and violence, and the making of the visible marks, should be within the policy period, then no case was made warranting the submission of the case to the jury.

STEEL SHAVINGS FOUND SEPTEMBER 24, 1924

We will endeavor to give a complete statement of the evidence bearing upon the presence of these steel shavings. It is, indeed, peculiar, to say the least, that they appeared, subsequent to the time the loss of the money was discovered. Such, however, is the fact. It is not necessary that we should speculate as to the motive of the one placing them there.

We will first consider Defendant in Error's evidence which offered no explanation of these shav-

ings but which, standing alone, we think establishes that the shavings were not present on the morning of September 5. Certainly there was no attempt on the part of defendant to show that they were present at that time.

Mr. Sutherland, the auditor of the Fair Association, after testifying that $5,000 additional was left with him for business purposes on that morning (Tr. 39)—although the other evidence showed that it was not needed for that purpose (Tr. 39, 43)—on cross examination testified that when the robbery was discovered, the chief of police. finger print expert, Jordan, and several other officers were called; that the witness went into the vault and looked the safe over, and looked around inside the vault to see anything that could be discovered which would explain how the money might have been taken. "I made a pretty careful search at that time and on some subsequent occasions, from time to time, as I had leisure, I would look around in there with the idea of probably finding out some way that they might have gotten into the vault without going through the door. (Tr. 44.) The witness does not claim to have discovered any shavings.

Mr. Reinhardt, the auditor of the Fair Association, opened the vault door on the morning of September 5th, and was the first one to see inside, and was the one who caused the police to be notified. (Tr. 47.) On cross examination he testified that of

the $5,000 extra money, placed in Sutherland's hands on the morning of September 4th, very little was used. (Tr. 48.) He went in with the police. (Tr. 49.) This witness at no time gave any testimony as to having seen any steel shavings, notwithstanding he was in charge of the auditor's office. He testified: I did not look to see how entry had been effected to the safe or whether there were any marks on the safe. We had to go to work when the police were there and left them in charge. (Tr. 49.)

Mr. Semple, on direct examination, testified that for the purpose of trying to find out how the robbers got in, that on Friday morning, September 5th, he engaged the Burns Detective Agency for the purpose of finding out "how this was done." We already had one of the Burns people out there working for us, and they assigned others immediately to work on the thing, who were there with the police officers and city detectives. They made an investigation here and in other places so far as we thought was necessary. (Tr. 25.) This witness was present when the drilled hole was discovered on September 24th, and then noticed the steel shavings. (Tr. 58.) On cross examination this witness testified: "I first knew of the shavings on the same evening, September 24th. (Tr. 59.) At that time, on September 5th, I investigated and examined for the purpose of discovering any kind of a clue as to how the entrance could have been effected, and this was being generally done by the fair officials, the police officers, the

employes of the Fair and others, and there were several police officers from the detective force of the city of Spokane out there looking things over that day, and they spent practically the entire day of the 5th going over that situation. * * * On the morning of September 5th, when the loss was discovered, Chief Turner, Officer Jordan, the finger-print man from the police station, and two or three others, officials from the detective force of Spokane, were there. * * * I saw some of these officers going over the interior of this vault, over the walls and flooring and ceiling; that was all gone over. I did not see any of them using a magnifying glass. I know they made an examination for finger prints. * * * From the morning of the 5th to the evening of September 24th there was lots of officers around these platforms and the Fair Association had on the premises some private detectives. * * * I did not see these steel shavings which I have referred to before Corey had taken out the combination and had discovered this hole, and did not know of their presence before then. I had not seen them, so far as I know, between the morning of the 5th of September and the afternoon of September 24. I had heard nothing of the presence of shavings during that time." (Tr. 60-61.)

C. L. Corey, the safe expert, on direct examination, testified that he was the safe expert who was taken out by the Fair Association to again examine the safe on September 24th (Tr. 81) and saw the steel shavings at that time. (Tr. 82.) On cross

examination he testified: "I don't know where these shavings came from unless they came from the second drilling. I don't know but what may be some one put them there. They covered a space of a couple of feet may be." (Tr. 89.) Mr. Corey had been out previously after the robbery had been discovered, a time or two, but does not claim to have seen any shavings until September 24. (Tr. 81.) "I had made an examination of the premises on Sunday following the close of the fair." (Tr. 89.)

On Plaintiff in Error's case the following testimony was introduced, and none of it was impeached or contradicted in any manner.

Chief of Police Turner testified that on the morning of September 5th, he visited the Fair Grounds with other police officers and with the finger-print expert; that he spent most of the day out there and on subsequent days went out and made investigation. That the witness had specialized in the identification branch of police work; that he went into the vault and assisted Jordan in making his investigation. "I looked the safe over and examined several articles with the magnifying glass with a view of finding finger prints. I was looking at a small iron roller. I don't know whether it would be a ticket roller or just what the purpose of it was. Jordan has it here." The witness further testified when he so examined this iron roller under a magnifying glass there were no steel shavings on it. (Tr.

104-105.) That on the afternoon of September 24 he again examined it and there were a number of steel shavings (Tr. 106); that on September 5th he checked up a number of articles from under the safe and examined them, and if there had been any steel shavings on the stand on which the safe was resting that he thought they would have attracted his attention. That he did not discover any shavings on that, or on any of the subsequent days, until September 24th. That on the afternoon of September 24th he noticed them immediately as soon as he got into the vault room and they were very noticeable. He was standing several feet away when he noticed them. (Tr. 106-107.)

Officer Jordan testified that he had specialized in finger print work; that he made an examination inside the vault on the morning of September 5th and on other occasions; that he examined the safe to see whether any force had been used in opening it and examined the ticket holder. That this ticket holder, on the morning of September 5th, was on the stand upon which the safe rested, under the front part of the safe; that he picked the ticket holder up and examined it and put it back where he had found it, and it was still there on September 24th; that he made a careful examination of this ticket roller under a magnifying glass and did not discover the presence of any steel shavings. That he looked over the platform and the different articles there and discovered no steel shavings. (Tr. 114-116.) That

after the drilled hole was discovered the prosecuting attorney delivered this roller to the witness and there were then steel shavings on same and they could be easily seen. (Tr. 119.)

Officer Thompson, on the Sunday following the robbery, was detailed on the case. He was in the vault and went over everything inside carefully. He did not see any steel shavings but testified "If there had been steel shavings there at that time I couldn't help but see them." (Tr. 120-121.)

Officer Aikman was detailed on the case on the morning of September 5th. With Officer Alderson he inspected the interior of the vault and looked over the safe particularly and saw no steel shavings. (Tr. 124-125.)

Officer Hudson, on the Sunday following the robbery, was detailed on the case. He went over everything inside the vault with the greatest of thoroughness. "The safe was supposed to have been examined by several men. "Yes, I looked it over. I looked under and tested the bottom of it. I made a complete examination of all that I could see about the safe and what was under it. I moved everything that was around the safe away from the corner—I moved everything that was movable and moved it back. I had to take a light for the examination. With that light I could see everything that was to be seen. I don't remember seeing Exhibit 23 in there. I saw no steel shavings under or about the

safe. I think, with the examination I made, I would have seen them if they had been there. There were none there that I saw." (Tr. 127-128.) This officer remained on the case about five weeks and devoted no time to any other work. He was at the fair ground on the afternoon of September 24th when the steel shavings were discovered. He noticed them immediately, when he went into the vault room, without anyone directing his attention to them, and was then standing several feet away. (Tr. 128.) There was no difficulty in seeing the shavings and the witness picked up about a half teaspoonful of them. There were then on the platform two scale weights and in the notch of these weights was a small amount of brass shavings (Tr. 129). That when the witness made the examination on September 7th these weights were not in that position or place nor was the brass there at that time. (Tr. 130.) On September 7th these weights were either on top of the safe or on one of the shelves. They were used by the witness to hammer the walls with in making his tests. (Tr. 131.)

Officer Keenan testified that he started to work on the case on the Monday following the robbery. That he entered the vault, looked it over, looked around the stand or bench, around the top of the bench. "I did not see any steel shavings." (Tr. 132.) On the morning of the 25th of September the shavings were easily noticeable. (Tr. 133.)

Officer Self testified that he was one of the first to reach the auditor's office after the robbery. He inspected the interior of the vault and saw the ticket tray. He saw Officers Jordan and Hunt handle it. While this witness was in the vault he had a flashlight and was using it in making his examination. (Tr. 134.) "I looked in the safe, in the pigeon holes around the face of the safe and all around it." That he saw everything that was in the vault and safe (Tr. 135) and did not see any shavings. (Tr. 136.)

J. W. Bolt, another lock expert, was called by the Fair Association to examine inside of the vault and the safe, and between September 5th and September 24th changed the combination of the safe. He did not see any steel shavings. After September 24th he did see them and they were easy to be seen. (Tr. 136-137.)

Denfendant in Error may, in its brief, refer to the fact that Corey, the safe expert, testified that when he pulled off the dial rim on September 24th, some shavings fell out. (Tr. 82.) This statement, however, seems to be inconsistent with the witness' testimony at another place that the shavings were first discovered by Officer Hudson (Tr. 89) who came out to the fair grounds on the afternoon of September 24th after the drilled hole was discovered and the combination dial and dial rim had been taken off. Officer Hudson (Tr. 130) and Chief of Police Turner (Tr. 107) both testified that they were

the ones who first discovered these steel shavings. Mr. Corey testified further, "I had not discovered them—I had not looked for them." (Tr. 89.) Therefore we say, this testimony of Mr. Corey is quite inconsistent. Nevertheless, if there were any steel shavings at that time under the dial rim, it leaves the situation worse for Defendant in Error. According to Mr. Corey these steel shavings under the dial rim may have been placed there by some one, "maybe someone put them there." (Tr. 89.) It is certain, however, that they were not there as the result of the robber having drilled into the steel plug. The robber could not have drilled into the steel plug without ruining the dial rim (Tr. 89, 95.) The shavings made by such a drilling, if they were held by any dial rim, it would be by the ruined one which would have to be replaced. The dial rim on the safe at the time these shavings were discovered had not been damaged (Tr. 90.) Defendant in Error then sought to establish that there might have been a few shavings that remained in the hole after the plug was removed. Defendant in Error overlooks the fact that according to the evidence of Corey the plug was not drilled out (Tr. 87, 88) and the only possible theory was that it might have been drilled into with a smaller drill and then pulled out (Tr. 88). This method, however, would prevent any shavings ever getting into the hole. They simply would never be in the hole at all. All shavings from such a drilling would necessarily fall on the outside. This was con-

ceded by Mr. Corey where, on cross examination, he testified:

> "I know that that dial rim was not and could not be in place on that safe at the time that drill hole was made, or if there was a plug there at that time the plug was put in. There is a very easy explanation as to how the shavings got in the dial rim which is, there is a certain amount of shavings that are left in the hole after you drill it and after the dial rim is put on on the slamming of the door back and forth would cause the shavings to drop out from in front down into the dial rim. These shavings would rest down in the edge of the rim—the ones which might be jarred back into the dial rim by the slamming of the door would be inside of the hole. If that hole was drilled by Mr. Larson in 1922 and a plug was put in there there couldn't be any shavings and if the plug was put in there and driven out from the inside there couldn't be any shavings there, and if a smaller hole was used to bore into the plug and they in that way extracted the plug, well there may have been some shavings in behind the plug. They would have to be very far in. The plug, as a usual thing, is only a short one." (Tr. 92-93.)

Pertinent to the above quotation from Corey's testimony, is what this Court can see by an examination of this drilled hole. The hole is drilled on a considerable downward slant, being lower on the inside than at the outside of the door. The theory, therefore, of a few steel shavings being on the inside of the hole and jarring out, is, as can be easily seen, an impossibility. However, the witness' evidence quoted above concedes this.

ERRORS BASED ON CONSTRUCTION OF POLICY BY DISTRICT COURT

Specifications 4, 6, 7, 8, 9 *and* 10.

II.

Some of these specifications will be discussed in a later part of this brief, but under this heading we will discuss them only from the standpoint of what Plaintiff in Error considers was an erroneous construction of the policy. The error committed, if the construction was wrong, was of the most substantial character. As we have shown above, if an inference could be drawn from the evidence introduced, that this plugged hole played any part in the loss of the money, all of the evidence tended to prove that the hole was used, if at all, for the purpose of obtaining the combination, prior to the policy period, noon, August 31, 1924. The question is, therefore, squarely raised by the instructions requested and refused, and the instructions given, as to whether force and violence used, and visible marks made, prior to the policy period can be considered for the purpose of establishing a liability. The material parts of the policy bearing upon this question are the following:

> "I. To indemnify the Assured for all loss by burglary * * * by any person or persons making felonious entry into such safe or vault by actual force or violence, of which force and violence there shall be visible marks upon said safe

or vault by tools, explosives, chemicals or electricity.

IV. This agreement shall apply only to loss or damage, *as aforesaid,* occurring within the policy period. * * *

C. The company shall not be liable * * * nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock."

Item IV of the Declarations provides that the policy period "shall be from August 31, 1924, to Septmeber 10, 1924 at 12 o'clock noon." We will not attempt to state the theory of the District Judge in giving the policy a construction, which permits a recovery, if the only force and violence occurred, and the only visible marks were made, prior to the policy period, and which also permits a recovery where the entry was made during the policy period by the use of no force or violence, and without making visible marks of such entry, and the only means used during the policy period of effecting the entrance was the manipulation of the combination lock. As we read the policy no such construction is possible.

The manifest intention of the insurer and insured when this policy was written and delivered, was to effect insurance for a period of but ten days. A premium was paid for but that period. It is unthinkable that the insurer could be held liable except during that period. The insurance, to be effective during the policy period, was to be of a certain char-

acter, and no other. It was insurance against burglary, where the property was taken from a certain specified place, by a person making felonous entry into such place, by actual force and violence, and who left a certain character of visible marks upon the safe of such entry. The burglary mentioned would not be of the character covered by the policy, unless all of the said elements were present. A certain kind of burglary only was insured against. That this is true is made further certain in paragraph IV, where it is provided that the policy "shall apply only to loss or damage *as aforesaid*," The word "loss" in this paragraph relates to the preceding paragraph No. I, while the word "damage" relates to the preceding paragraph No. II. By this paragraph IV, it is thus expressly provided that the policy relates only to a loss "*as aforesaid*," referring back to the limitations contained in paragraph I, and it must have occurred "within the policy period". We cannot conceive how there could be any possible foundation for a claim that there is here anything that is ambiguous. The construction adopted by the District Court violates the manifest intention of the parties. It could not have been in the mind of the insured that things occurring outside of the policy period might be considered for the purpose of creating a liability. It must have been in the contemplation of both parties that the conditions, necessary to create a liability, should occur within that period, It could not have been in the contemplation of either party, that the premium paid for the limit-

ed period, should entitle the assured to rights on account of things done outside of that period. While Defendant in Error in this action has not sought to recover damages under paragraph II above, for damages to the safe, yet it would have been just as reasonable for it to have made that claim, if the safe was in fact damaged, before the policy period, by the withdrawal of the tapered steel plug, as it would be to claim a recovery for the money abstracted from the safe, where the plug was withdrawn prior to the policy period.

An insurance contract is not construed, or enforced, any differently from any other contract, executed under like conditions. An insurer is not considered less favorbly, by the courts, than any other contracting party, nor is an insured considered more favorably. It is the rule that any ambiguity, in an insurance contract, is construed favorably to the insured, but this is not because the insured is treated as a favorite of the law. The reason for such rule is, that insurance policies are prepared by the insurer, and often the language is considerably involved and the insured has no voice in the preparation of the policy. The foundation of the rule for the construction of insurance policies is based upon the rule applicable to other contracts, viz., that in case of ambiguity, they will be construed against the one who prepared the contract. It is, however, only where there is an ambiguity that such rule is applied.

It is not applied for the purpose of punishing one, or rewarding the other, party to the contract.

FUNCTION OF COURT. In construing a contract of insurance made by parties competent to contract, it is the duty of the court to follow the law and confine itself to a determination of the meaning of the language employed, or, in other words, to a determination of what the contract is; in the absence of waiver, ambiguity, illegality, fraud, mutual mistake, or some phase of equitable jurisdiction, and in the absence of a statute requiring a construction or effect other than that intended by the parties, it is the function of the court to construe and enforce the contract as it is written and not attempt to make a new contract for the parties, nor, by implication of construction, add to the contract words, terms, conditions, exceptions, promises or obligations which it does not contain. Indeed, it is only when the contract is ambiguous that the court can resort to construction; where the language employed is clear and definite there is no occasion for construction or the exercise of a choice of interpretations. The court should lean to a construction which makes the contract definite and certain rather than to a construction which leaves a question which must be submitted to a court for determination in substantially every case."

32 C. J. p. 1148 Sec. 258, and cases cited.

See also:

9 C. J. 1096.

"A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written con-

tract shall be regarded as the sole repository of the intention of the parties and that its terms cannot be changed by parol testimony is of the utmost importance in the trial of jury cases and can never be departed from without risk of disastrous consequences to the rights of the parties."

Northern Assurance Co. v. Grand View Bldg. Ass'n., 183 U. S. 308, 332 (46 L. Ed. 213).

"The rule is well settled that: 'where a written contract is susceptible on its face of a plain and unequivocal interpretation resort cannot be had to evidence of custom or usage to explain its language or qualify its meaning. *Hunt v. Fidelity & C. Co.*, 99 Fed., 242, 245; 39 C. C. A. 496.' Having satisfied ourselves that the policy is susceptible of a reasonable construction on its face without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose. *The Insurance Co. v. Wright*, 1 Wall, 456, 470, 17 L. Ed. 505."

Kentucky Vermillion L. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. (9th Cir.) 695.

"The argument there made by the attorney for the Drainage District is repeated in his brief; that is, the defendant in error being a compensated surety would not be released from the bond except to the extent of the damage sustained by reason of the increased cost resulting from the additional requirement made upon the contractor. The bond is a contract between the parties. The enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compen-

sated or not. It cannot be one contract when the surety is compensated and another contract when the surety is not compensated."

Bench Canal Drainage District v. Maryland Casualty Co., 278 Fed. (8th Cir.) 67, 80.

"It is urged that the principle of construction which should be applied to the policy is that: 'Words of exception of limitation of liability in an insurance policy are to be strictly construed against the insurer and forfeiture avoided if possible' * * * we think the law is in substance correctly stated by counsel, yet we must add that if the language used by the parties has a plain meaning and is not inconsistent with other clauses or provisions of the contract, effect must be given to it. The court cannot ignore express stipulations in order to obviate a hardship. * * * It is right to infer that the quality of insurance had its counterpoise in the price paid for it."

Gilchrist Transp. Co. v. Phoenix Insurance Co., 170 Fed. (6th Cir.) 279, 281.

In Frankel v. Massachusetts Bonding & Insurance Company, 177 S. W. (Mo.) 775, somewhat similar questions were involved as in the case at bar.

The Court says:

"In the next place, while it is true that insurance policies are to be construed in favor of the insured and against the company, yet this is only permissible where there is room for construction. Such rule does not permit courts to remake policies, or to change the face of their

plain and explicit terms. The rule above mentioned is applied where the insurance contract contains clauses of doubtful, ambiguous or conflicting meaning."

The case of Rosenthal v. American Bonding Company, 46 L. R. A. (N. S.) 561, deals with quite similar questions to those involved here. In the notes are cited all the cases up to that date, involving burglary policies. It was urged that because the evidence clearly established that a burglary had been committed, that the provision of the policy requiring visible marks of force and violence was no longer material. It is said:

"Doubtless the justice of the provision would be a subject for disagreement between the parties to the contract. Quite possibly the interpretation which had been outlined might prevent recovery on bona fide losses. On the other hand, quite commonly an entrance into a building for burglarious purposes, which was accompanied by 'actual force and violence' would not be made during business hours by opening an unlocked door, but would be effected by methods which would leave marks upon the premises which would be quite respectable evidence that a burglary had been committed within the indemnity policy. But these considerations, on one side or the other, are not before us in this case. If the parties to a contract adopt a provision which contravenes no principle of public policy, and contains no element of ambiguity, the courts have no right to relieve one of them from disadvantageous terms, which he has actually made. * * * But if the contract is not of uncertain meaning, as has often been said, the

courts may not make a new one under the guise of construction."

In Hartford Fire Insurance Co. v. Wimbish, 78 S. E. (Ga.) 265, the action was to recover for damages to an automobile, occasioned by theft, robbery or pilferage. It is said:

> "And we know of no authority for giving any different meaning to these words in a contract of insurance, wherein it is stipulated that the company would be liable for loss or damage to an automobile resulting from theft, robbery, or pilferage."

In Stich v. Fidelity & Deposit Co., 159 N. Y. Sup. 712, it is said:

> "Where the evidence is entirely consistent with the loss by negligence of the party insured, or by the innocence of a third party, the plaintiff has obviously failed to prove a loss by felonous abstraction."

A case having some bearing is that of Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576 (156 Pac. 557.)

A very interesting case arising on a burglary policy and having some bearing on this case is that of the Bank of Monrovia v. Maryland Casualty Co., 28 Am. Eng. Ann. Cases, 1913-C, page 1176 and notes.

In Blank v. National Surety Co., 165 N. W. (Ia.) 46, the burglary policy was similar to the one

here involved. The rule is stated that while in case of ambiguity the policy would be construed most favorably to the insured, that, nevertheless, if there was no ambiguity a strained construction would not be adopted for the purpose of creating a liability. It is further held that visible marks made upon the building in effecting an entrance would not bring the case within the policy requiring visible marks of force and violence.

III.

Specifications 3 *and* 4.

These specifications relates to Plaintiff in Error's requested instruction 4. The policy provides specifically that it does not protect against "opening the door on any vault, safe or chest, by the use of a key or by the manipulation of any lock." This provision of the policy was plead as, and relied upon, as an affirmative defense. The testimony clearly established this affirmative defense, as shown by the references above. The District Court refused this requested instruction, but did give another instruction relating to entrance being effected by "manipulating the combination." (Tr. 146.) The instruction as given was qualified by the previous instructions, which were given, to the effect that, if knowledge of the combination had been gained by force or violence at any time, the loss would be within the protection of the policy.

It is our contention that, irrespective of how the knowledge of the combination was obtained, whether with, or without force, or violence, nevertheless, there would be no liability, if the door was opened solely through manipulation of the combination lock. Still, for a greater reason, if the force and violence used for the purpose of obtaining the combination, was prior to the policy period, the defense, that entrance was made by manipulating the combination lock, would be good.

For another reason, this instruction given by the Court does not cure the failure to give requested instruction 3. It will be noted that in the instructions so given, the jury is told, that, the affirmative defense, of entry being made by "manipulating the combination," would only be good, if entrance to the safe was effected without employment of actual force or violence. Force and violence alone would not destroy this affirmative defense. The provision of the policy is, there should only be a liability, where the entry was "felonous," and where there were "visible marks" made upon such safe or vault by tools, explosives, chemicals or electricity, evidencing such force and violence. The instruction given by the Court denied the defense, if there was actual "force or violence" used in making the entry. This "force and violence" might have been the entry through the grandstand, the partition to the Auditor's room, the vault door, intimidation of someone,

the wrenching of a knob on the safe door, or other similar acts.

IV.

Specification 5.

This specification relates to requested instruction 6. In substance, this requested instruction was, that no recovery could be had unless the tapered steel plug, in the safe door, was removed by the alleged burglar or burglars. The requested instruction was refused, and there was no similar instruction given. We submit that the error is manifest and was most prejudicial.

There was no evidence before the jury, or claimed evidence, that there was any force or violence, or visible marks, which would bring the case within the protection of the policy, except it was originally claimed, there was such evidence due to drilled hole, and later, apparently, on account of the removal of steel plug.

If the Court should conclude, that there was a legal basis for an inference, that, the plug was removed by the one robbing the safe, and by the removal of such plug the robber learned the combination, still there could be no foundation for the action, unless such robber did in fact remove the steel plug. Plaintiff in Error was therefore entitled to a positive instruction, that unless the jury should find that the

plug was removed by the robber, no recovery, could be awarded Defendant in Error.

V.

Specifications 11 *and* 12.

These specifications relate to the overruling of Plaintiff in Error's, petition for a new trial, and in entering judgment. Under these specifications there is nothing further to add than has already been discussed above.

We respectfully submit, that, there was no evidence introduced from which an inference could legally be drawn, which would sustain a liability in this case; that, even if there was any evidence, which would sustain an inference, that, the robber removed the steel plug, and by so doing learned the combination, nevertheless, there were no visible marks on the safe, of tools, explosives, chemicals, or electricity; the evidence conclusively establishes, that, the entrance was effected by the manipulation of the combination lock; that even if there was any force, or violence, or visible marks, they all antedated the policy period. That in any event, the construction of the policy by the District Judge was erroneous, and prejudicial error was committed in other respects as above suggested.

We submit that the judgment of the lower court should be reversed and judgment ordered in favor of Plaintiff in Error.

WILLIAMS & CORNELIUS,

Attorneys for Plaintiff in Error.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

Brief for Defendant in Error

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Spokane, Washington
Attorneys for Defendant in Error.

EMPIRE PRINTING CO., SPOKANE

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION,
Defendant in Error.

No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

---

Brief for Defendant in Error

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Spokane, Washington
Attorneys for Defendant in Error.

Foreword.

We shall refer to the parties by their designations below, speaking of the plaintiff in error as defendant, and of the defendant in error as plaintiff.

Defendant did not challenge the sufficiency of the evidence at the close of plaintiff's case. Necessarily, that was an admission that plaintiff had made a *prima facie* case. At the close of all the evidence, defendant challenged the sufficiency of the evidence, and its principal assignment of error, apparently, is the denial of that challenge. It is, therefore, asking the Court to read and consider plaintiff's evidence, then read and consider the evidence introduced by defendant, and determine whether the *prima facie* case made by plaintiff was not destroyed, as matter of law, by defendant's evidence. In view of that request, we want to say a word concerning the transcript of evidence which the Court must read if it is to critically examine and weigh the evidence. It bears upon its face evidence that the testimony was either very badly reported, or that the reporter's notes were very badly abstracted. To make the situation worse, there are many material errors in the printing of the transcript of evidence. As an illustration, on page 82 there are several transpositions, leaving the greater part of that page meaningless. Again, at page 120, at the conclusion of the testimony of the witness Jordan, there are not only transpositions but evident omissions. How

much was omitted and what its materiality cannot be told. There are a number of other equally flagrant errors, which we shall not take time and occupy space to point out. Suffice it that the face of the transcript shows that its contents are not clear and complete, and that it is impossible for this Court to possess itself of the evidence as it was presented below. That in itself is sufficient cause for declining to weigh the evidence for the purpose of determining whether plaintiff's *prima facie* case was overcome by defendant's evidence.

Sufficiency of the Evidence to Sustain a Recovery.

By eking out the garbled transcript (we do not use the term to import unfairness, but only incompleteness and confusion) with references to the plats and photographs in evidence, it is possible to obtain a fair general idea of the case presented. We shall state the material facts as we gather them from the record, and the theory which we think they sustain, before replying to defendant's argument.

For some considerable period, plaintiff has conducted a fair and exposition at its grounds in the city of Spokane. The fair is held annually, for a week during the first days of September. Except during the actual duration of the fair, and for a short period of preparation and dismantling immediately preceding and following it, the fair grounds and buildings are unused and unoccupied.

Among other buildings on the fairgrounds is a

grandstand. This structure opens to the east upon the racetrack. Flanking it on the north and south are "bleacher" seats, also opening to the east on the racetrack. See blueprint, plaintiff's exhibit 3. The upper seats of the south bleacher are attached to the grandstand. The lower seats are cut away, leaving an opening between bleacher and grandstand. See plaintiff's exhibit 4, where the opening is marked "driveway," and plaintiff's exhibit 6, where the opening appears in the foreground of the photograph.

Underneath the south end of the grandstand, and opening to the west, several rooms have been constructed, which are used for offices while the fair is in progress. See plaintiff's exhibit 4, which shows the arrangement of the offices, and plaintiff's exhibit 10, which shows the manner in which they are built into the grandstand. The room farthest back, *i. e.,* farthest to the east, is the auditor's office room. There is no entrance to this room except through the offices in front, *i. e.,* to the west, of it. The east wall of the room, which separates it from the empty space under the grandstand, is of wood, without openings in it. There are two windows in the south wall, but these are covered with a heavy steel netting, so that access to the room cannot be gained through them. About the center, along the west wall, of the auditor's room, is a steel cashier's cage. To the west of the cage, and opening into it, is a vault, and in this is a safe in which the money taken in

during the day is kept until it is deposited in the bank. The cashier's cage, a part of the east wall and the north wall of the auditor's room, including the table underneath which the panel opening into the room from underneath the grandstand was discovered, are shown by the photograph, plaintiff's exhibit 8.

In preparing for the opening of the fair in 1922, two years before the burglary which is the cause for this suit, plaintiff's officers were unable to open the safe, the card containing the combination numbers having been lost, and no one remembering what they were. Plaintiff's manager sought help from a safe agency, and it sent an expert locksmith, the witness Larson, to open the safe. It seems that no expert ever attempts to open such a safe by manipulating the lock until he learns the numbers, as that would be an interminable and probably fruitless task. Instead he drills a hole into the lock, and by inserting a wire and using it in a manner known to experts, in a few minutes is able to learn the numbers and work the combination. Larson so proceeded in this case, drilling a hole through the dial rim and safe door at the point where experts usually drill when doing such work. When he had got the numbers and opened the safe, he removed the dial rim, drove a steel plug into the hole he had drilled in the door, and put on a new dial rim. When that rim was put on it covered the plug, so that from the exterior there was no indication of what had been

done, and the safe door appeared to be in the same condition as when it came from the factory. The safe door, lock, plug and dial rim were not disturbed from that time until the time of the burglary involved in this case.

In 1924 the fair opened on Monday, as usual. There were heavy receipts on Thursday, which was the big day of the fair. It was the custom to keep each day's receipts in the safe in the vault over night; bank messengers coming out to get the money the next morning. Thursday night the cashier made up his cash as usual, and put all the money on hand in the safe, except some sacks of silver which were too bulky to go into the safe, and were stacked by its side in the vault. The auditor supervised the operation. The cashier then looked around the cage to see that no money was left out, and reported everything in order. The auditor then closed and locked the safe door, throwing the combination; closed the inner doors of the vault, which were not locked; and then closed and locked the outer door of the vault, throwing the combination. He was seen to do those things by the cashier, and both were positive that the outer vault door and the safe door were locked and the combinations thrown. Both men left the room in a short time, between 10:30 and 11 at night.

The auditor was the first to come on duty in the auditor's room the next morning, reaching there at eight. His first act was, as usual, to open the vault.

The outer vault door was closed and locked, and he opened it by working the combination. When he opened the outer door, he saw that the inner doors, which he had closed the night before, were open. Turning on the vault light, he saw that the safe door was open, and that the contents of the safe had been disturbed. He immediately called other employes of the fair and telephoned to the fair officials and the police. An examination was made when the police arrived, and it was found that all the money put in the safe and the vault the night before had been taken.

We shall now digress to remark upon such of the surroundings as are pertinent to the manner of the burglary.

By referring to the blueprint, plaintiff's exhibit 3, it will be observed that the west wall of the grandstand structure, through which access is had to the offices under the grandstand, opens on the Midway and on the buildings used for exhibition, restaurant, and amusement purposes. This space was all brilliantly lighted at night when the fair was in progress. To reach the auditor's office, in which 17 electric lights, some of them of 100 watts or over, were kept burning all night long, it was necessary to pass through the main office, and by the side of the police room. These rooms were lighted, and police and other employes were in or passing in or out of these rooms at all hours of the night. No interloper could get into the auditor's room from the west, and

make the trips in and out which would be necessary to carry away the money that was taken—which included seven sacks of silver, each containing $500—without being discovered. Given a means of entrance, however, access could be readily had to the auditor's room through the east wall without discovery. The grandstand opened to the east upon the racetrack and the waste space which it surrounds. At night these were, of course, deserted and unlighted. Immediately south of the grandstand, the sweep around the curve in the track, extending to a point on its east side, is protected and screened by heavy shrubbery. Just beyond the shrubbery is the outer fence of the fairgrounds, beyond which, again, is a railroad right of way and tracks. Given a means of exit through the east wall of the auditor's room and through the grandstand, one could pass at night as many times as one pleased out to the racetrack, the shrubbery, and through the fence by gates or loose boards, without fear of detection. Nor, given a means of entrance through the northerly portion of the east wall of the auditor's room, was there any probability that a man who kept to the north end of the room would be detected by persons in the front offices, provided he moved silently. Referring again to plaintiff's exihibit 4, it will be observed that the entrance to the cashier's cage and to the vault is concealed by the vault itself from the observation of anyone in the outer offices. Only by going back to the auditor's room, passing into it by the door at the south end of its west wall, and around

the cashier's cage to the north end of the room, would the presence of any one in the vault be discovered.

Returning to the occurrences just after the burglary, several detectives from the police force, and a private detective, were at once put on the case. They worked on it for two days, and discovered nothing which would throw any light on the manner in which the burglary was committed. Sunday morning a new man, Hudson, was put to work. After looking over the situation, he reached the conclusion that whoever took the money could not have come in by the west entrance, and taken the money out that way, as he would certainly have been detected by the employes who were on duty at night had he pursued that course. The necessary inference was that access to the room had been gained through the east wall. Hudson therefore began to search for any trace of an entrance effected there. He seems to have begun his search in the unused space under the grandstand (for the nature of which see photograph, plaintiff's exhibit 9), for his first clue was the discovery of cleats nailed across some boards on the inside at the extreme southeast corner of the grandstand. Following up the clue, he found that several boards had been sawed at that point so as to separate them from the rest of the wall, and that cleats had been nailed across them and leather hinges fitted to them on the inside so as to make a door in the grandstand wall. On the outside, care had been taken by the use of white paint mixed

with earth to give the door the same appearance as the remainder of the wall. Tr., 55, 73.

The location of this door in the grandstand may be seen by reference to the photograph, plaintiff's exhibit 6. It is marked by the dark boards in the photograph. The police took the original door, and the hole left had been patched with boards before the photograph was taken. Tr., 53. It will be noted that the door opened within a few feet of the racetrack, and that one coming from the outside in the shadow of the shrubbery along the racetrack, on the dark side of the grandstand, could reach the door with scarcely a chance that he would be detected.

Stimulated by the discovery of the door in the outside of the grandstand, Hudson called to his assistance several employes of plaintiff, and they began a minute examination of the east wall of the auditor's room, seeking a door. With some on the outside, others on the inside, they set out to tap and try every inch of the wall. A sliding door or panel leading into the room from underneath the grandstand was finally discovered. It was in the extreme northeast corner of the room, and was made and put in place with such nicety and precautions against its discovery that it would not have been discovered by any less careful search than that made by Hudson. Tr., 71-74. It opened into the auditor's room under a table which was fastened into the east wall. See photographs, plaintiff's exhibits 7 and 8. Plaintiff's exhibit 9 shows the location of the panel

in the outside wall of the auditor's room, underneath the grandstand. It should be observed that these photographs do not show the panel in place. The police took the panel, and the photographs were taken after the hole so left had been patched. Tr., 53-54.

We go on now to the manner in which entrance into the vault and safe was effected.

The morning the burglary was discovered, two expert locksmiths, Bolt and Corey, were sent to the fairgrounds. They made a casual inspection of the safe, and seeing nothing wrong with it paid no further attention to it. Examining the outer vault door, they discovered that the screw which connected one of the bolts to the main draw bar had been cut or removed, so that when the handle of the door was turned to shoot the bolts into their sockets and fasten the door, that particular bolt would not be moved. Friction tape, so fresh that it was sticky, was wrapped around that bolt, to prevent the other bolt from clanging against it and making a noise. They discovered, also, that the vault door was sprung in such a manner that if the disconnected bolt had been forced into its place, as it would have been had it been left connected to the main draw bar, it would have caused considerable noise when the door was opened and closed. Tr., 99. Previous to the robbery, it was noticed that the bolts in the vault door had been freshly oiled. Tr., 69. It ap-

parently was not oiled by any one connected with the fair. Tr., 76-77.

Matters remained in that situation for two or three weeks. Plaintiff employed a firm of lawyers to take up the case, and one of them desired to go carefully into the conditions surrounding the burglary. Tr., 56. He went to see Corey, one of the locksmiths who had examined the safe the morning after the robbery, and inquired if Corey had made a detailed examination of the safe. Corey acknowledging that he had not, arrangements were made for Corey, several officers of the fair, and the lawyer to go out and examine the safe. Corey took the entire lock out and examined it carefully. The first unusual thing he discovered was a drill mark on the carrier tumbler. When he took out the screws holding the dial rim, the rim did not fall off, and when he took it off with his fingers, he found "shavings," *i. e.,* particles of steel caused by the operation of a drill, underneath the rim. Next he discovered the hole which Larson had drilled through the door into the combination lock. The plug which Larson had driven into the drill hole was gone. The plug could have been removed from the outside by drilling it out with a drill the same size as the plug, or by drilling into it with a drill of a smaller size, running threads in it, inserting a tap, and then pulling it out. The only other way in which it could be removed would be by opening the safe door, removing the combination, and driving

the plug out from the inside. Tr., 81-83, 86-91.

Upon the discovery of the things just noted, the police were called. On their arrival, Corey was asked to explain how a safe could be opened through such a hole as that found in the safe door. He attempted to do so, using a large flashlight in explaining the method. In order to concentrate the light on the door, the light in the ceiling of the vault was turned off. In the course of the explanation, the flashlight was turned down to the base on which the safe stood, and this disclosed steel filings, such as would be made by drilling into the safe, scattered over the base and for some inches out in front of it, and within a radius of perhaps a foot and a half or two feet. Tr., 57-58, 89. In drilling a hole into steel, the filings or shavings thrown out by the drill do not all fall straight down. They will be scattered around, the distance they are thrown depending on the speed at which the drill is operated. Tr., 89-90.

The matters above stated are not in dispute. The evidence establishing them permits of but one reasonable theory as to the manner in which the burglary was effected. It is this: Some time before the fair opened in 1924, a skilled yeggman (probably there were two or three in the job, but it is more convenient to speak in the singular) planned to rob the safe some night during the progress of the fair; preferably, if there were no preventing circumstances, on the night of the largest day of the fair, when there would be more money in the safe than

at any other time. Probably he was about the fair during the preceding year, and observed the manner in which operations were conducted during fair time. Possibly he was able to obtain all the information he needed by a study of the buildings and surroundings during the summer, when the fair was not in progress. There was nothing at that time to prevent him making as careful a study as he desired. The fairgrounds are extensive and secluded, and during the intervals between fairs the grounds are deserted. Tr., 68. These problems confronted him: To arrange for an entrance into the auditor's room where he would not be exposed to detection in going in, getting the money, and making the several trips that would be necessary to carry it away if it were largely coin: To make such preparations beforehand as would enable him to make his entrance and get the money speedily and noiselessly, for during the progress of the fair there were a number of employes around the main office, even at night, who might by chance come into the auditor's room, and who would probably hear any noise that might be made in entering the auditor's room, the vault, or the safe: To so conceal his preparations that they would not be discovered before the time he wished to commit the burglary.

Now, whether the yeggman made his observations the preceding year during fair time, or during the month or so preceding the fair in 1924, it is certain that he would at once put out of consideration any

thought of getting into the auditor's room from the west side of the building. He had to get into the room not only, but to make the several trips that would probably be necessary to carry away the money. It would manifestly be impossible to do that, undetected, from the west. Referring to the blueprint, plaintiff's exhibit 3, it will be observed that the west side of the grandstand gives upon the most frequented, and consequently the best lighted, part of the fairgrounds. On that side are all the principal entrances, all the exhibition buildings, amusement resorts and restaurants. While the fair was in progress, there were 24 men on duty on the grounds at night. Tr., 68. The auditor's room and vault were back of the main office, police room, and other offices used in the conduct of the fair. Plat, plaintiff's exhibit 4. Employes would, of course, be in and about those offices during the night. No sane man, to say nothing of an experienced yeggman, would dream of trying to reach the vault and carry out the money through the entrance from the west. Equally beyond consideration would be the windows in the south wall of the auditor's room. These were protected by steel netting. If this were cut away before the perpetration of the burglary, its removal would be discovered and the intended crime be suspected and guarded against. If it were cut away the night of the burglary, the noise made would almost certainly attract the attention of watchmen. At any rate, any one attempting to carry away the money through those windows would

be in almost as exposed a position as he would be if he attempted to take the money out through the west entrance.

There was, clearly, but one practicable way of effecting an entrance to the auditor's room, and that was from the east, approaching through the unused space under the grandstand. The racetrack was a few feet from the grandstand. The south curve of the track was almost coincident with the outer fence of the fairgrounds. Beginning within 75 feet of the southeast corner of the grandstand, there was heavy shrubbery all around the south curve of the track. Tr. 68; blueprint, plaintiff's exhibit 3. Furthermore, the track and the east side of the grandstand were deserted and unlighted at night. A pedestrian could unobserved pass back and forth between the outside and the grandstand in the shadow of the shrubbery; there would be small chance that an automobile driven in there would be observed. Our yeggman, therefore, placed his entrance underneath the grandstand at its extreme southeast corner. Great care was taken in finishing the exterior of the entrance door, so that its presence would not be observed; it was hung on leather hinges, so there would be no squeaking when it was pushed up. Making an entrance from beneath the grandstand into the auditor's room was a more difficult task. The room was much used during fair time, and it was, of course, essential that the entrance into it be not discovered. The skill with

which the work was done; the foresight with which every chance of detection was guarded against, is testified to by Hudson. Tr., 72, 75. It appears more conclusively from the fact that although Hudson and his assistants knew there was a door somewhere in the wall, they could only discover it by tapping carefully along the whole wall. Tr., 73. Here again noise was guarded against, for the panel was greased so it would slide easily. Tr., 75.

The yeggman now had provided an ideal means of entrance and exit to and from the auditor's room. His next care was to make preparations for getting quickly and quietly into the vault and safe when the time for the burglary arrived. There was no trouble about getting into the vault. The inner vault doors were never locked. Tr., 49. The combination lock on the outer door was set on three numbers. Tr., 103. It could be easily picked by an expert, who ought to get it in an hour's time, easily. Tr., 100-101. When the yeggman found the combination, he no doubt put it down so that he could open the door in a minute when the burglary was committed. In opening the vault door, however, he discovered that the door was sprung and one of the bolts bound, causing considerable noise in opening and closing the door. He therefore disconnected this bolt, wrapped it with tape so that the other bolt would not strike against it and make a noise, and oiled the other bolts so they would move smoothly. Tr., 99, 69. This brought him to the safe, the most serious

obstacle to be encountered. Its lock could not be opened by manipulation, as had been done with the lock on the vault door. The more numbers there are in a combination, the more difficult it is to open the lock by manipulation. Tr., 100. The safe combination was set on four numbers. Tr., 69. It might be the work of years to open a four-number combination by manipulation. Tr., 99. There is but one sure way to get at such a combination, and that is to drill into the lock. Any other way depends wholly upon luck. Tr., 102. Therefore, no expert attempts to open a burglar proof safe by manipulation. He drills, with a wire ascertains the numbers, then works the combination. Tr., 78-79. There are two places for drilling: where Larson did, or at the top. Tr., 82. The hole is usually drilled where Larson drilled if the driller is so situated that he can obtain a new dial rim. Tr., 95. A yeggman is necessarily an expert locksmith. The one with whose operations we are dealing had no thought of trying to open the safe by manipulation, but intended to drill, as any other expert would have done. It was necessary, however, that he leave no trace of his operations, and so he either carried with him, or procured after he had seen the safe, a new dial rim to take the place of the one which would be disfigured in drilling into the lock. Such rims are easily obtainable. Tr., 80. When he was ready to begin work, he probably bent the dial rim back, so that he would not be obliged to drill through it. This might be readily done. Tr., 95. If he did that, he would at

once have seen the place where Larson had drilled, and have drilled the plug out, or removed it by inserting a tap. Possibly he drilled through the rim, and struck the exact place where Larson drilled. There is a definite point at which to drill, and any expert would attempt to drill at that exact point. Tr., 79, 82. It is extremely improbable that the yeggman, drilling through the rim, would have exactly centered the plug put in by Larson. However, "The hole is not clean cut on the outside. It would be possible another drill went through there, because the hole is not true—it is not a perfect circle. * * * it might be possible a second hole went through there." Tr., 87. Whichever course was pursued, the plug put in by Larson was removed and the yeggman, doing what Larson did in 1922, inserted a wire in the lock, ascertained the combination numbers, and put them down. He then opened the safe, removed the disfigured dial rim, replaced it with a new one, and then closed and locked the safe, leaving it intact in outward appearance. That done the stage was set, and the production of the performance was easy. When the chosen time came, the burglar went underneath the grandstand, passed through the secret panel into the auditor's room, opened vault and safe with the combination numbers of which he had previously obtained knowledge, and carried the money out to an automobile awaiting him in the shadow of the shrubbery alongside the racetrack.

The points which defendant makes against a recovery on the foregoing theory, if we understand them, are these:

(1) *The evidence is as consistent with the theory that the safe was entered without force and violence as it is with the theory that force and violence were employed. When evidence presents two theories, upon one of which the defendant would be liable and upon the other he would not, there can be no recovery, for the jury will not be permitted to adopt one theory rather than the other.*

That is a most astonishing position to take. In the first place, the evidence is not as consistent with the theory that force and violence were not used as with the theory that they were. Defendant's counsel avoid the formulation of any definite theory, but none can be formulated of an entry without force and violence which will fit in with the accepted facts except this: Some time previous to the opening of the fair in 1924, some person who knew the combinations of vault and safe, presumably one of plaintiff's officers or trusted employes, planned to burglarize the safe during fair week. He constructed the doors in the grandstand and the wall of the auditor's room, either to divert suspicion or to afford him an exit without being seen, and fixed the vault door so it could be opened noiselessly. On the night of the burglary, he opened the vault and safe by working the combinations. The theory must now adopt two alternatives to explain the removal of the

plug which Larson drove in the hole he drilled, and the presence of the drill shavings which were found about the safe two weeks after the burglary was committed. One is that the burglar desired to assist plaintiff to recover from defendant, and so returned, opened the safe, took out the lock and removed the dial rim, drove out the plug that Larson put in, scattered drill filings around the safe and put some under the dial rim, then replaced all parts of the lock and closed and locked the safe. The other alternative is that plaintiff's officers removed the plug and scattered the drillings about for the purpose of fabricating a case against defendant. It overstrains credulity to accept either alternative. The person who committed the burglary would certainly not risk detection by going back to tamper with the safe when there was nothing for him to gain by doing so. So far as plaintiff's officers are concerned, they are men of means and of high position and standing. If they removed the plug and scattered the drillings about to make a case against defendant, they were guilty of a more heinous crime than the burglary. In their brief, defendant's counsel several times repeat that "it is presumed that an act has been rightfully done, and was not of a wrongful nature," citing pages of authorities to sustain the statement. Some one committed the burglary. That is not questioned. Counsel, however, would add another crime. They would have it that the burglary was committed by one of plaintiff's officers or employes, and that afterwards either

the burglar or some of plaintiff's officers who were innocent of the original offense, committed the crime of fabricating a case to cheat defendant out of the insurance money. The presumption counsel invoke militates against this pyramiding of crime, and requires that it be presumed but one crime was committed and that it was committed in the manner to which the evidence points.

Counsel's conclusion is more faulty than their premise. The rule for which they contend is stated in variant forms, but it comes to this: Where the plaintiff's case depends upon an inference to be drawn from the evidence, such inference must be the only one which can be reasonably drawn; "must be inconsistent with any other rational conclusion." Where two inferences may be drawn, the jury "may not speculate which to accept"; in order that the case may go to the jury, "The facts from which the inference is sought to be drawn must exclude any other hypothesis, and possibility is not sufficient." Defendant's brief, pp. 37-38.

The contention is not sustainable. If the law were so, no case could ever be made out by circumstantial evidence, for it is impossible to conceive of any combination of circumstances from which different inferences might not be drawn. Yet no one would question that circumstantial evidence may be, and frequently is, of greater probative force than direct evidence. See *Ex parte Jefferies* (Okl.), 124 Pac., 924, which Professor Wigmore says has be-

come the classical exposition of the value of circumstantial evidence. 5 Wigmore, Evidence, Supp. (2d ed.), §26. The rule with respect to circumstantial evidence is the same as that which prevails with respect to direct evidence: if different inferences may be drawn therefrom, it is the province of the jury to draw them.

> "Circumstantial evidence is legal evidence, and if the facts are shown by circumstantial evidence, and are such that reasonable men may reasonably differ upon the question whether there was negligence, the verdict of the jury should not be set aside or reversed. Meier v. Nor. Pac. Ry. Co., 51 Or., 69, 93 Pac., 691; C., R. I. & P. Ry. Co. v. Wood, 66 Kan., 613, 72 Pac., 215. So in the present case, if the facts are such that more than one reasonable conclusion or inference can be drawn from the circumstantial facts in evidence, one that negligence has been shown, and the other that negligence has not been shown, and the jury decide and determine that negligence has been shown, the action of the jury should not be disturbed."
>
> *Calkins v. Blackwell Lbr. Co.* (Ida.), 129 Pac., 435, 440.
>
> "The rule has been announced by this court that the jury cannot be permitted to indulge in mere conjecture; and that something more must appear in order to sustain a finding. St. L., I. M. & S. Ry Co. v. Henderson, 57 Ark., 402, 21 S. W., 878; Walker v. Louis Werner Sawmill Co., 76 Ark., 436, 88 S. W. 988. While this salutary rule is not to be ignored, it is equally well settled that any material fact in controversy may be established by circumstantial evidence; and that, though the testimony of witnesses may be undisputed, the circumstances

may be such as that different minds may reasonably draw different conclusions therefrom. Such a state of case calls for a submission to the jury of the questions at issue; and, where the circumstances are such that different minds may reasonably draw different conclusions therefrom, and the result is not a mere matter of conjecture, without facts or circumstances to support the conclusion, then it is the duty of the appellate court not to disturb the finding of the jury."

St. Louis etc. Ry. v. Owens (Ark.), 145 S. W., 879, 880.

See *Bradbury v. City of South Norwalk* (Conn.), 68 Atl., 321, and cited cases.

Nowhere has the rule above stated been more vigorously enforced than in the Federal courts.

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them. Railroad Co. v. Stout, 17 Wall., 657; Washington & Georgetown Railroad v. McDade, 135 U. S., 554; Delaware & Lackawanna Railroad v. Converse, 139 U. S., 469.'

Richmond & D. Ry. v. Powers, 149 U. S., 43, 45.

This Court has said:

"It is just as well settled, however, that if reasonable minds may fairly draw different conclusions as to the facts, and different inferences from the evidence in respect to alleged con-

tributory negligence, the determination of that question is for the jury, under appropriate instructions from the court."

Evans v. So. Pac., 202 Fed., 160, 162.

In other circuits the rule is the same.

"It is not a sufficient reason for treating such a question as we have here as one of law that there is no conflict of testimony. Where two impartial and intelligent men could reasonably draw different inferences from an undisputed fact, a question for the jury is presented."

Western U. Tel. Co. v. Hall (4th C. C. A.), 287 Fed., 297, 303.

"When evidence of these facts is in conflict or of a nature from which reasonable men may honestly draw different inferences, the existence of the contract and its terms are matters of fact to be determined by a jury."

Pacific Mut. L. Ins. Co. v. Vogel (3d C. C. A.), 232 Fed., 337, 342.

"In disposing of a motion to direct a verdict, the trial court cannot weigh the evidence, but must take that view of the evidence which is most favorable to the parties against whom the motion is made, and deny the motion, if the evidence, when thus viewed, will warrant the conclusion that fair-minded men might honestly draw different conclusions therefrom."

Payne v. Haubert (6th. C. C. A.), 277 Fed., 646, 650.

"The facts were undisputed, and whether the defendant was negligent or not, and whether the plaintiff was in the exercise of due care or not, depended upon the inferences which might be reasonably drawn from these facts. If, upon either of these questions, these inferences could lead a reasonable mind to only one conclusion—upon the first that the defendant was not guilty

of negligence, or upon the second that the plaintiff was not in the exercise of due care—then clearly it was the duty of the presiding judge to have directed a verdict for the defendant; but if there were inferences which might be justifiably drawn from these facts by fair-minded men that would sustain the allegations of the defendant's negligence and the exercise of due care by the plaintiff, then it was the duty of the court to submit the evidence of these facts to the jury, although other equally fair-minded men might draw an opposite conclusion from them."

Boston El. Ry. v. Teele (1st. C. C. A.), 248 Fed., 424, 431.

"The well-established rule is that on a motion for a directed verdict the court must take the view of the evidence most favorable to the adverse party. Crookston Lumber Company v. Boutin, 149 Fed., 680, 79 C. C. A., 368; Southern Ry. Co. v. Gadd, 207 Fed., 277, 125 C. C. A., 21, affirmed 233 U. S. 572, 34 Sup. Co., 696. 58 L. Ed. 1099. Another rule, equally well established, is that only when all reasonable men, in the honest exercise of a fair, impartial judgment, would draw the same conclusion from the facts which condition the issue, it is the duty of the court to withdraw that question from the jury. District of Columbia v. Robinson, 180 U. S., 92, 21 Sup. Ct., 283, 45 L. Ed., 440; Delk v. St. Louis & San Francisco R. R. Co., 220 U. S., 580, 587, 31 Sup Ct., 617, 55 L. Ed., 590; St. Louis, Iron Mountain & Southern Ry. Co. v. Leftwich, 117 Fed., 127, 54 C. C. A. 1; Teis v. Smuggler Mining Co., 158 Fed., 260, 85 C. C. A., 478, 15 L. R. A. (N. S.) 893; Insurance Co. v. Hoover Dist. Co., 182 Fed. 590, 598, 105 C. C. A. 128, 136, 31 L. R. A. (N. S.) 873; Liberty Bell Gold Mining Co. v. Smugler-Union Mining

Co., 203 Fed., 795, 800, 122 C. C. A., 113, 118. *Hobbs v. Kizer* (8th C. C. A.), 236 Fed., 681, 682.

Further quotations are needless, for all decisions dealing with the subject are of the same tenor.

However, plaintiff is not obliged to rely upon the general principle above stated. Defendant's contention is ruled against it by *Travelers' Ins. Co. v. McConkey,* 127 U. S., 661, a case which is on all fours with the one at bar. The action was upon a policy of accident insurance. A stated sum was payable if the insured died as a result of "bodily injuries, effected through external, violent and accidental means," and provided that there should be no recovery if death resulted from "intentional injuries inflicted by the insured or any other person," nor unless the claimant should establish "by direct and positive proof that the said death or personal injury was caused by external violence and accidental means." The petition alleged that the insured was accidentally shot through the heart, whereby he instantly died. The allegation of accidental death was denied, and the answer alleged that the death of the insured was caused by suicide, or by intentional injuries inflicted by the insured or by some other person. The evidence showed no more than that the insured was found dead in his office late at night, with a bullet wound through his heart. There was also some evidence as to the movements of the insured on the evening of his death, and as to

the condition of his body and clothes, the effect of which is not stated. The defendant requested an instruction that the plaintiff was required to establish by direct and positive proof that the death was caused by external violence and accidental means, and also that the plaintiff's case could not rest upon conjectiure, but the proof must lead directly to the conclusion that the death was effected by accidental means. The instructions were refused. The Supreme Court held that the policy requirement of direct and positive proof of accidental death did not necessitate that direct evidence be given that the insured so died; that this might be found from the circumstances of the case. To quote (p. 667):

> "The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified."

If in the cited case it was within the province of the jury to draw inferences as to the manner in which the insured met his death, it was clearly within the province of the jury in the present case to draw inferences as to whether the steel plug was removed from the safe door for the purpose of effecting an entrance, or whether it was done after-

wards to fabricate a case against defendant.

Equally decisive against defendant's contention is the decision of this Court in *United States F. & G. Co. v. Blum,* 270 Fed., 946. The action was upon an accident policy, to recover for the death of the insured by falling from a window in his office. He was alone in the room when he fell, and the occasion of the fall was unexplained, save as it might be inferred. There was a good deal of evidence as to his condition, physically, mentally and financially, from which different inferences might be drawn. The situation in which the evidence left the explanation of the cause of his death was thus stated by the Court (p. 952):

> "The deceased came to his death by one of three means. He either died through natural causes (that is, by sudden demise) and fell from the window, or he voluntarily threw himself therefrom, or he fell from the window or the coping outside through accidental means."

The defendant moved for a nonsuit at the close of the plaintiff's case, and for a directed verdict at the conclusion of the evidence. Both motions were denied. Holding that their denial was proper, this governing principle was stated (p. 952):

> "It goes without saying that, in order for plaintiff to recover, there must be evidence that an accident occurred conducing to the injury. This does not mean, however, that there must be eyewitnesses to the accident or direct proof of the pertinent fact. The fact is susceptible of proof, as any other given fact, and it may

> properly be deducible by inference and presumption from facts proven; that is, the fact of accident may be established by circumstantial evidence, as other pertinent facts may be established under the rules of evidence. Brunswick v. Standard Acc. Ins. Co., 278 Mo. 154, 213 S. W., 45, 7 A. L. R., 1213."

The final conclusion was as follows (p. 958):

> "True, the jury cannot be permitted to find its verdict upon conjecture and surmise; but, from a careful survey of the entire testimony found in the record, we are assured that there is afforded a much more stable basis for inference and deduction, and that it was quite sufficient whereon to submit the case to the verdict of the jury."

In that case, then, there were three inferences which might be drawn as to the manner in which the insured met his death, only one of which would sustain plaintiff's case. Moreover, the circumstances which the plaintiff in this action relies upon to sustain its theory are much more cogent and convincing than were the circumstances relied upon to sustain the plaintiff's theory in the cited case.

Similar insurance to that here involved was involved in *Fidelity & Cas. Co. v. Bank* (Okl.), 142 Pac., 312. The policy sued on insured against loss caused by the felonious abstraction of money from a safe by the use of tools or explosives thereupon. It provided that there should be no liability if any one connected with the assured, as employe or otherwise, participated in the burglary. The complaint

alleged an entry and abstraction within the terms of the policy. The answer was a general denial, and an affirmative defense that the safe was opened and the money taken by one or some of plaintiff's employes. The evidence showed that on a certain night the safe was closed and locked with a combination lock, and that the next morning a window in the bank building was found open, the safe door was open, and a considerable sum of money had been taken from the safe. There was evidence of some scratches on the door knob, and that there was difficulty in closing the safe door, which justified an inference that the door had been sprung. It was held there was evidence to take the case to the jury.

> "This evidence is admittedly weak and unsatisfactory; but it seems that every known fact was brought out at the trial; and outside of the physical facts relative to the condition of the safe before and after the burglary, and that the employes knew the outer combination, there is nothing tending to show any connection of an employe with the crime. If the safe was closed in such way that the time lock bolts failed to operate, and this because of defects in the construction, it would be possible to force the outside combination with tools or explosives without leaving any extensive evidence of their use. If the safe door was closed the night before and open next morning, and so badly sprung that it could not be closed, it might be fairly inferred that either a tool or an explosive had been used on it. The marks on the dial may or may not have significance; but they are in the case with the other facts, and the jury passed on their sufficiency."

The decision was based upon the principle stated in the preceding quotations, *viz.,* that where different inferences may be drawn from evidence, whether circumstantial or direct, it is the province of the jury to determine what inference shall be drawn. As stated by the Oklahoma court:

> "In determining whether there was any evidence to support the finding of the jury, we must take all the evidence and consider it in its aspects most favorable to plaintiff's contentions; and then if we find evidence, taken with all reasonable deductions and inferences, to be legitimately drawn for it, from which it can be fairly said that it tends to prove plaintiff's cause of action, we have no right to disturb the verdict; and notwithstanding that, from all the evidence adduced, were the court the trier of the facts, they might have found differently."

Such being the law, no purpose can be subserved by counsel dilating upon the strength of their client's case and the weakness of the adversary's. The place for such arguments was in the lower court. The jury saw and heard the witnesses, and got the force of the exhibits as explained by the witnesses under direct and cross examination. The trial judge, who had the same opportunity for full appreciation of the evidence that the jury had, was under obligation to grant a new trial if he believed the verdict to be against the weight of the evidence. Any argument here must be based upon mutilated evidence; mutilated by passing through the understanding and the reproduction of court reporter,

abstracter, and printer. No more is proper, therefore, than to point out such salient features of the evidence as make the case one for a jury's consideration, and that we have heretofore done.

Human nature, however, will not permit us to pass unchallenged some of the assertions made concerning the steel particles on the floor of the vault, the presence of which was not discovered until September 24th. According to plaintiff's theory, when the burglar drilled the plug out of the safe door, which was done some time previous to fair week, the particles thrown off by the drill fell upon the base on which the safe was set and upon the floor of the vault. The base on which the safe was set was of rough, unplaned boards. The care which the burglar exercised in every other particular leads to the conclusion that after he had completed the work he brushed up these filings so far as he was able to, and that the remainder of the filings lay undiscovered where they had fallen until the lock was removed and the removal of the plug was discovered on September 24th. Defendant's counsel say that could not be; that it conclusively appears the steel particles were not there the morning after the burglary. Counsel are in error. It is true the particles were not discovered the morning after the burglary or for some time thereafter. It is true that some of the police endeavored to make it appear that the particles would have been discovered had they been in the vault the morning after the burg-

lary. That is a vastly different thing from the establishment of their absence in such conclusive fashion that the jury would not be permitted to find the contrary. These particles are spoken of in the testimony as "shavings," a term implying something of bulk and readily discernible. It creates a wrong impression. They were minute particles, no larger than filings, which were thrown off by a drill. They were not observable except by chance or unless search was made for them. The vault is dark, save as it is lighted by an electric light (size not shown) in the ceiling. When the vault was entered the morning that the burglary was discovered, the safe was the first thing examined. It appeared to be intact, without a scratch on it. As the situation was seen by the investigators, there was no reason to search for steel particles about the safe, for there was nothing about the safe to indicate that the burglar had drilled into it or done any work upon it. The safe was not even carefully examined because, as Corey, the locksmith, said: "It was the consensus of opinion there was nothing the matter with it." Tr. 81. Reading between the lines, it is apparent what occurred. When the police saw that both vault and safe doors had apparently been opened by manipulation of the combinations, with no evidence of violence in entering either the building, vault, or safe, they jumped to the conclusion that it was an "inside job," done by some fair official or employe, and that their task was to detect him. From that time on, their search around the vault and safe was

for finger prints. There was no reason for them to look for drillings or filings, and they did not do so. Seeking for what they were seeking, it would have been purest chance had they discovered the steel particles, and chance did not intervene. Having set their minds upon a theory, they stubbornly adhered to it. They would not admit that laymen had discovered what they overlooked, so as witnesses they made the most of the thoroughness of their search. It is patent that it was for the jury to say whether they might have overlooked the steel particles.

Other circumstances lead to the same conclusion. We must assume from the care displayed by the burglar in other particulars that he removed such of the steel particles as could be readily brushed up, and that there were a comparatively small quantity remaining, so small that they would not be readily discerned unless search was made for them. The filings were first discovered immediately after the hole in the safe door was discovered. The light in the ceiling of the vault had been turned off and Corey was using a strong flashlight under the safe. It was natural that after the hole was discovered it would be expected that there would be drillings about the safe. That would naturally lead to a search which had not theretofore been made, to discover if there were drillings about the safe.

Again, there were more filings about the safe when they were discovered on the 24th than there were the morning after the burglary. Corey testified that

when he removed the dial rim some shavings came out with it from underneath the dial rim. Tr., 82, 91. He explained their presence within the dial rim by saying that a certain quantity of the shavings would be left in the hole after it was drilled, and that the slamming of the door back and forth would cause the shavings to drop out from it down into the dial rim, where they would remain until the dial rim was removed. Tr., 92-93. The quantity of filings that were underneath the dial rim was not stated, but whatever the quantity, they were by so much more than were there the morning after the burglary, and the detection of the filings would be by so much the easier.

Taking all these things into consideration, it was evidently for the jury to say whether or not the filings (with the exception of those under the dial rim) were about the safe on the morning after the burglary and were not discovered because not searched for, or whether they were not there at that time and were subsequently "planted" for the purpose of helping to make a case against defendant.

What is defendant going to do with the undeniable fact that the steel particles were there on the 24th? Counsel say they are not required to speculate as to that. Ah, but they are. If no other reasonable theory for the presence of the particles can be suggested, it must be accepted as an established fact that they were made by the burglar in drilling out the plug in the safe door. Although they endeavor

to evade the downright assertion, counsel must propose the theory that the particles were placed there by plaintiff's officers for the purpose of fabricating a case against defendant. There is no middle ground between that theory and the theory that they were made by the burglar in drilling. Certainly, it was for the jury to say which was the more probable theory.

We do not wish it understood that it was essential to plaintiff's case that the jury find the particles were on the floor of the vault directly after the burglary. Their presence was a mere collateral incident, tending to support plaintiff's theory but not essential to it. If the jury felt itself unable to decide whether the particles were present on the morning after the burglary, but were overlooked by the police, it could have put that incident aside without decision without impairing the final decision, based upon the other circumstances, that force and violence were exerted in effecting an entry into the safe. The plug was removed. That is undenied. If it was removed in the process of effecting an entry into the safe by the burglar, that is all that is necessary. It is not necessary to connect the steel particles on the floor of the vault with its removal.

It is impossible to remark upon the numerous decisions which counsel cite under this head. We take three, which, from their position in citation, are presumably the leading ones, for remark.

In *Manning v. Insurance Co.,* 100 U. S., 693, an

insurance agent, sued for money in his hands belonging to the company, pleaded as a set-off commissions which he alleged to be due him on insurance premiums received by the company. The claimed commissions were only payable when the company had actually received the premiums. The agent offered no evidence that the company had received the premiums. He proved that on a stated date there were policies of a given amount in effect, but did not prove that such policies had been continued in effect, or that any of the premiums thereon had been paid to the company. That, manifestly, was an attempt to draw an inference from an inference; from proof that policies had once been in effect to draw the inference that they had been continued in effect, and from that inference to draw the further inference that the company had received the premiums thereon. As the Court said (pp. 698-99):

> "That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were $87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Every thing more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed.

> Built on this presumption was another, namely, that the renewal premiums were paid to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidence of fact did not go far enough."

The Patton Case (179 U. S., 658), is too well known to need more than bare remark. There was not a scrap of evidence tending to show how the engine step, the turning of which caused the plaintiff's injury, became loose. The plaintiff relied on the doctrine of passenger cases, which the Court refused to apply. Of course the case does not touch the settled rule of the Federal courts, that if the evidence warrants an inference of liability, it is not insufficient because an inference of non-liability might also be drawn from it.

United States etc. Co. v. Bank, 145 Fed., 273, was an action upon a fidelity bond, given to insure the honesty of an employe of a bank. A sum of money disappeared. Several employes had equal means of access to the safe where the money was kept, and equal opportunity to take the money. There was no evidence, no circumstance, even the slightest, tending to show that the insured employe, rather than other employes having equal opportunity, took the money. Naturally, it was held there could be no recovery.

So far as the language quoted from the last case is concerned, the same Court, holding that a case was made for the jury when different inferences might be drawn from circumstantial evidence, said of the language used in the cited case:

> "It is not easy to formulate a general rule that will determine in advance the effect of, or the weight that shall be given to, the infinite variety of circumstances that may be offered to establish a principal fact under judicial investigation; and plainly it was not intended to do so in that case, or in the case from which the quotation is made. Each case must rest upon its own facts, and under the facts there shown it is entirely plain that the circumstances were insufficient to warrant a finding that the pecuniary loss of the bank resulted from the 'personal dishonesty or culpable neglect' of the bonded teller. When different inferences or conclusions may fairly and reasonably be drawn by impartial minds from the proven facts, it is the province of the jury, under proper instructions from the court, to draw them; and only when the facts are such that but one conclusion or inference can reasonably be drawn therefrom may the court declare that conclusion. Northwestern Fuel Co. v. Danielson, 57 Fed. 915-920, 6 C. A. C., 636; Goldsmith v. Thuringia Ins. Co., 114 Fed. 914-916, 52 C. C. A. 534; and this is all that is held in United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, above."
>
> *Finch v. Ottawa,* 190 Fed., 299, 303.

While we shall not remark upon any of the other cases cited by defendant, we will say that we have run through them, and every one is as wide of the mark as those we have referred to.

We submit there are but two inferences which can be drawn from the evidence in the present case. The first is that the burglary was committed by a skillful yeggman, who laid his plans and carefully made his preparations some time before the fair opened, so that when the appointed time came he might quickly and noiselessly effect an entrance and take the money. In preparing for the burglary, he drilled out the plug which Larson had put in, so that he might learn, as Larson had done, the combination of the safe through the hole into the lock. The second is that the burglary was committed by officers or employes of plaintiff, who knew the combination of the safe and opened the door by working it, then later removed the plug and scattered drill shavings around in order to fabricate a case against defendant. Now, there is in evidence a mass of circumstances all having weight, some more, some less, in the determination of which was the more reasonable theory. Most important were the circumstances indicating how the burglary was committed, for from these it could almost infallibly be determined whether the work was that of a skilled yeggman or of an amateur. Among other circumstances the jury had the right to consider, was the care taken to prevent discovery of the preparations made for commission of the burglary before it was committed, and to prevent detection when the burglary came to be committed. There was the location of the entrance to the space beneath the grandstand next to the racetrack, in such position that a person coming

from outside the fairgrounds could keep within the shadow of the shrubbery along the racetrack until he was almost to the entrance, thus practically insuring him against detection as he went in and carried the money out. The manner in which the entrance door was constructed, with leather hinges so there would be no squeaking when the door was opened, and with the sawed boards painted over with white paint mixed with earth, giving them the same appearance as the wall around them and preventing detection of the door from the outside, were pertinent circumstances. The manner of the construction of the panel leading into the auditor's room was even more important. It must have been made by one very skillful in the use of tools, for only the most careful search by men who were convinced there was an entrance somewhere in the east wall of the room brought it to light. Here again care was taken that there should be no noise when the panel was opened, for it was greased so that it would slide easily and noiselessly. The same care was observed in the preparation of the vault door, when the one bolt that bound so that it would make a noise when the door was opened was disconnected and wrapped with tape so that the other bolt would not make a noise by striking against it, and the other bolts were oiled so they would slip smoothly in and out of their sockets. The work on the safe was that of an expert. The plug that Larson had put in was removed and a new dial rim was put on, leaving no trace of what had been done. As the result showed, only an

expert locksmith, taking the lock to pieces, could discover what had been done. If defendant's theory is the correct one, the man who did all these things was an amateur, probably unskilled in the use of tools. If the plaintiff's theory is correct, the work was done by a skilled yeggman. As a part of their trade, such men must be skillful in the use of tools of all sorts, and, of course, they must be able to foresee, before undertaking the job, all the dangers which will arise in its execution and make preparations to forestall, so far as possible, all such dangers. Patently, it was for the jury to say, in view of all those circumstances, whether what was done was the work of a skilled yeggman or of a bungling amateur.

Again, acceptance of defendant's theory entails acceptance of the idea that some officer or employe of the fair who knew the combination of the safe door unlocked it. It appears that the only persons who had knowledge of the combination were Mr. Griffith, plaintiff's president; Mr. Semple, who is assistant to the president; Mr. Reinhard, the auditor; George Nettleton, who had previously to this fair been deputy auditor, and Mr. Hannon, who was at one time manager of the fair. Mr. Nettleton and Mr. Hannon were not in Spokane when the burglary was committed. Tr., 69. If entrance to the safe was effected in accordance with defendant's theory, it was effected by Mr. Griffith, Mr. Semple or Mr. Reinhard, and one of those gentlemen must have

afterwards "planted" the steel shavings so as to fabricate a case against defendant. Was it not for the jury to say whether it was probable that any of these gentlemen, or all of them combined, would commit the dual crime of burglarizing the safe and then fabricating a case to cheat defendant?

In none of the cases cited by defendant upon this point were there any circumstances tending to indicate whether the one theory or the other should be adopted. Patently, they are utterly inapplicable to a case where so many cogent circumstances to determine a choice are present as there are in this case.

(2) *The removal of the plug was not a visible mark of force and violence.*

When the hole that Larson drilled had served his purpose, he stopped it by driving in a steel plug. The plug then became a part of the door, serving the same purpose as the original material which had been drilled away. No person could thereafter obtain knowledge of the combination by penetrating to the lock through that hole without removing the plug. The plug could not be removed without the use of force and violence, and assuredly the hole left after the plug had been removed was a visible mark of the force and violence used. We assume that counsel would not contend that if no hole had ever been drilled in the safe, and the burglar drilled a hole in the original material for the purpose of

penetrating to the lock chamber and learning the combination, that the hole remaining would not be a visible mark of the force and violence employed. If that is true, then the hole left after the removal of the plug was a visible mark of the force and violence used in removing it. It is idle to attempt to distinguish between the original material of the door which Larson removed in order to effect an entrance, and the substitute material put in by Larson which the burglar removed in order to effect an entrance.

Furthermore, the reason for the requirement that there should be a visible mark does not necessitate that there should be any particular kind of a mark. The policy insures against burglary, as contradistinguished from theft. To restrict liability to burglary, and to guard against the possibility of an inference that force and violence had been used when there was no clear evidence of it, the provision that the force and violence must be evidenced by a visible mark was inserted. Any sign, therefore, which evidences force and violence satisfies both letter and reason of the policy. As to what is sufficient, see *National Surety Co. v. Silberberg* (Tex.), 176 S. W., 97; *General Accident Corp. v. Stratton* (Ky.), 178 S. W., 1060; *Maryland Cas. Co. v. Bank* (Neb.), 107 N. W., 562; *Palace Laundry Co. v. Royal Indemnity Co.* (Utah), 224 Pac., 657; *Goldman v. New Jersey Fidelity Co.* (Mo.), 183 S. W., 709; *Fidelity etc. Co. v. Bank* (Okla.), 142 Pac., 312.

(3) *Plaintiff misrepresented the construction of the safe.*

This point is based upon the fact that in the description of the safe which is appended to the policy sued on, the outer door of the safe was described as quarter inch steel, and no mention was made of the hole that had been drilled in it and the plug inserted therein. Assuming this to have constituted a misrepresentation, it was not material to the risk. The burglar was obliged to drill the plug out in order to make use of the hole for entering the safe, or to drill into the plug, insert a tap, and then pull the plug out. Either operation was as difficult as drilling through the door as Larson did. The burglarizing of the safe was not rendered easier by the presence of the plug.

At any rate, a section of the insurance laws of Washington provides that:

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive."
>
> 2 Remington's Comp. Stat., 1922, §7078.

Defendant did not plead misrepresentation as a defense, or ask submission of the issue of misrepresentation to the jury, so that it might pass upon the question of intent to deceive. In fact, no representations of any sort were made by plaintiff. Plain-

tiff's president called up defendant's local agents on the telephone, and asked them to put on a burglary and hold-up policy. On that direction the policy sued on was issued. Tr., 37. What appears in the policy was inserted by the agents upon their own information and initiative.

(4) *The safe was entered by manipulation of the lock.*

The entrance was effected by force and violence, combined with manipulation of the lock. The burglar could not manipulate the lock without knowing the combination. By the exertion of force and violence he penetrated the chamber containing the lock, inserted a wire, and was thus enabled to ascertain the combination. With the knowledge so gained, he manipulated the lock and opened the door. It was the prior exertion of force and violence which rendered the manipulation of the lock possible.

That being so, this point is ruled against defendant by the doctrine of proximate cause. The policy insures against loss caused by the taking of property from the interior of the safe if entry into the safe was effected by force and violence. Tr., 8-9. If force and violence were the proximate cause of the entry, defendant is not relieved from liability because of an intermediate cause, not covered by the policy, albeit such intermediate cause contributed to the entry. That force and violence, the penetration of the lock chamber by drilling, was the proximate

cause of the entry into the safe, is established by *Insurance Company v. Boon,* 95 U. S., 117. A policy insuring against loss by fire stipulated that the insurer should not be liable if the insured property was destroyed by a fire taking place "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." During the civil war, the town in which the insured property was situated, which was occupied by Federal troops, was attacked by Confederate troops. The Federal commander defended the town for some time, then seeing that he could not continue the defense, he set fire to the city hall, which contained military stores, so that they might not fall into the enemy's hands. The fire spread to other buildings, and ultimately destroyed the insured property. In an action upon the policy, the question was whether the Confederate invasion was the proximate cause of the destruction of the insured property, in which event the insurer would not be liable, or whether the setting of the fire was an independent, intervening cause, in which event the insurer would be liable. Holding that the invasion was the proximate cause of the loss, the Court said (p. 130):

> "In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur.*

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

After the discussion of authorities, it was further said (pp. 132, 133):

"It is a doctrine resting upon reason, and in accord with the common understanding of men. Applying it to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action.

* * * * *

"In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On

the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole."

In *Milwaukee Ry. v. Kellogg,* 94 U. S., 469, 474, it was said:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

In *Insurance Co. v. Transportation Co.,* 12 Wall., 194, a part of the syllabus is as follows:

"When two causes of loss occur, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B., if the damage caused by each peril

> can be discriminated, it must be borne proportionately.
>
> "But if the damage caused by each peril cannot be distinguished from that caused by the other, the party responsible for the predominating, efficient cause, or that which set in operation the other incidentally to it, is liable for the loss."

Undoubtedly, the predominating, efficient cause for the entry into the safe in the present case was the force and violence by means of which the combination of the lock was ascertained. The manipulation of the lock which followed was a mere incident, necessary to the opening of the safe, but which would not have occurred but for the preceding force, by means of which the manipulation was rendered possible. Adapting the language of the Boon Case, the force and violence by means of which the combination was learned, and the manipulation of the lock which followed upon and was made possible by the force and violence, constituted a continuous chain of events—"events so linked together as to form one continuous whole."

Another viewpoint. By one part of the policy, defendant is made liable if entry into the safe is effected by force and violence. By another part, defendant is exempted from liability if the safe was entered by manipulation of the lock. Which provision governs when, as here, both manipulation and force and violence have played a part in effecting the entry? The policy makes no provision for such

a case. The language of the policy is, as to such a case, ambiguous, and there should be applied the rule stated in these words:

> "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."
>
> *Mutual Ins. Co. v. Hurni Co.,* 263 U. S., 167, 174.

Or as it is stated by this Court:

> "It is the language of the insurance company that we are called upon to construe, 'and it is both reasonable and just that its own words should be construed most strongly against itself.' "
>
> *Aetna Ins. Co. v. Sacramento Co.,* 273 Fed., 55, 58.

Still another viewpoint. Considering the policy as a whole, it is apparent that the sole purpose of the provision that defendant should not be liable if entry to the safe was effected by manipulation of a lock, was to ensure that it should only be held for a loss in which force was a causative factor, and not for a loss caused by mere thievery. In the main part of the policy, defendant agreed to indemnify "for all loss by burglary," then added the express stipulation that liability should only attach if entry into the safe was effected "by actual force and violence of which force and violence there shall be visible

marks. " Tr., 8-9. That would appear to be sufficient to restrict liability to losses in which force was an element, and to exclude liability for loss caused by mere thievery, but defendant, after the fashion of insurers generally, added a number of precautionary provisions, the only effect of which was to further safeguard against liability being imposed for theft. These will be found under the head of the policy entitled "exclusions," Tr., 10-11, and prominent among them is the provision that there shall be no liability if entry to the safe is effected "by opening the door of any vault, safe or chest by the use of a key or the manipulation of any lock." Clearly, that only expresses in another form what was provided in the preceding part of the policy, viz., that defendant should only be liable for a loss caused by burglary, for a loss occasioned by an entry into the safe which was effected by force and violence. Since the only purpose of the provision was to make certain that defendant should not be held liable for loss caused by thievery alone, as contradistinguished from a loss caused by burglary, in which force and violence played a part, it does not stand in the way of recovery where force and violence were effective factors in causing the loss. albeit the manipulation of a lock contributed to the result. Take this supposititious case: Suppose that the burglar had drilled into the lock chamber, and then instead of using a wire to ascertain the combination numbers, he had injected some explosive, by the explosion of which the effectiveness of the

combination lock was destroyed and he was thereby enabled to manipulate the lock and open the safe. Would it not certainly be held in such a case that entrance was effected by force and violence within the meaning of the policy? And if it would be so held in the supposititious case, why must it not be so held in the actual case?

Of the decisions cited by defendant under this head, substantially all are so absurdly irrelevant that we shall pay no heed to them. Two or three may merit brief mention. These hold that when the safe described in the policy has several doors, and the policy warrants the construction that each of these must be opened by force in order to render the insurer liable, there can be no recovery where one of the doors was opened by manipulation of the lock, albeit force was employed in opening the other doors. The leading case of that class is *First Nat'l Bank v. Maryland Cas. Co.* (Cal.), 121 Pac., 321. The policy sued on in that case insured against loss by burglary from the safe or safes described in the schedule attached when entry was made into such safe or safes by the use of tools or explosives directly thereupon. There was a special agreement that the insurer should not be liable for the loss of money from a burglar-proof safe containing an inner steel burglar-proof chest, unless the money was "abstracted from the chest after entry also into the said chest effected by the use of tools or explosives directly thereupon." The safe referred to in the

policy had an outer door which was secured by a combination lock and a time lock. Inside it was a burglar-proof chest in which the money was kept. This was only secured by a combination lock. Some time before the burglary which was the occasion of the action, the assured employed a locksmith to do some work about the safe, the vault in which the safe was located, and the locks on the doors of both. While so employed, he ascertained the combinations on all the doors. Knowledge of the combination on the outer safe door would not avail him, because the time lock prevented the use of the combination until the hour for which the lock was set arrived. That, of course, would not be an hour when burglars could operate. He therefore tampered with the time lock, so that if the door were struck with a heavy hammer in a given place, the time lock would be disarranged and rendered inoperative, and the combination could be worked. The numbers of the combinations were given to a confederate, and he was instructed what to do to put the time lock out of order. At a suitable time the confederate broke into the building, opened the vault door with the combination given him, struck with a heavy hammer the handles of the outer door of the safe until the time lock was put out of order, then opened that door and the door of the inner burglar proof chest by working the combinations. It was held there could be no recovery; that although the outer door of the safe was opened by the use of tools, the door of the inner chest was opened by the use of the combination alone.

There is little to criticize in the decision, although, as we shall later show, it is opposed to the weight of authority. The policy contained a special agreement that the insurer should not be liable for money taken from the inner chest unless it also was entered by the use of tools or explosives. Concededly, it was not so entered. Tools were used on the outer door only, and the inner door was opened solely by working the combination, knowledge of which had been wrongfully obtained. But we do not understand how it can be thought that the decision bears upon the present case. Here the safe had only a single door, and moreover there was no special agreement such as was contained in the policy in the cited case. Indeed, the decision is inferentially opposed to defendant's position. In the cited case, the entry through the outer door of the safe was partly effected by the use of tools, whereby the time lock was rendered useless, and partly by working the combination. Here the entry was partly effected by force and violence, drilling into the lock chamber to ascertain the combination, and partly by working the combination. In the cited case, it was held that so far as the outer door of the safe was concerned, entry was effected within the terms of the policy; that the plaintiff's case failed only because the entry into the inner chest was not so effected. To quote (p. 326):

> "It may, of course, be conceded that the entry into the safe itself was effected partially by the use of the hammer operating to disarrange the

> time lock after it had been adjusted by Martin, so that this might be accomplished, and partly by the use of the combination which could be used after the time lock had become ineffective. And, for present purposes, it may be conceded that the entry into the safe was made by the use of tools directly upon the safe. But to make the defendant liable under the provisions of the policy it was incumbent on plaintiff to prove that, not only was entry made into the safe by use of tools, but that tools were used directly upon the inner chest itself."

Obviously, if the California court had been dealing with a case like the present, where but a single door is involved, and entry was effected partly by force and partly by manipulation, it would have held the entry was within the terms of the policy.

While of no importance to the present case, it should be remarked that the decided weight of authority is that when there is more than one door to a safe, an entry through one of the doors which is within the terms of the policy warrants recovery, notwithstanding the entry through the other door or doors, whether inner or outer, was not of such a character as would entitle the assured to recover. *Moskovitz v. Travelers' Indemnity Co.* (Minn.), 174 N. W., 616; *Columbia Casualty Co. v. Rogers Co.* (Ga.), 114 S. S., 718 (Court of Appeals), 121 S. E., 224 (Supreme Court); *National Surety Co. v. Chalkley* (Tex.), 260 S. W., 216; *Fidelity & Casualty Co. v. Saunders* (Ind.), 70 N. E., 167; *T. J. Bruner Co. v. Fidelity & Casualty Co.* (Neb.), 166 N. W., 242;

Rosenbach v. National Fidelity Co. (Mo.), 221 S. W., 386. The California case must either be distinguished from those cases by virtue of the special agreement relating to the entry to the inner chest which was there involved, or be held opposed to the great weight of authority.

(5) *Any force and violence exerted upon the safe, and any visible marks thereon, were exerted and made prior to the policy period.*

That is undoubtedly true, but how does it affect plaintiff's right to recover? By the first paragraph of the policy, defendant agreed to indemnify the assured for all loss by burglary occasioned by abstraction of property from the interior of the safe described in the policy by any person making felonious entry into the safe by actual force and violence, of which force and violence there should be visible marks made upon the safe. Tr., 8-9. Possibly if this clause stood alone there would be some ground for the contention that in order to hold the defendant liable it must appear not only that the loss occurred during the policy period, but that the force and violence used in effecting entry to the safe should also appear to have been exerted during that period. At least, there is nothing in that paragraph which expressly negates the idea that to warrant a recovery it is necessary to show that the loss and everything leading up to it occurred during the policy period. However, by the fourth paragraph of the policy that idea is negated, and it is clearly ex-

pressed that to establish a right to recover it need only be shown that the loss occurred during the policy period. That paragraph reads: "This agreement shall apply only to loss or damage as aforesaid occurring within the policy period defined in item 4 of the declarations," etc. Tr., 9. Here, then, is a distinct statement, something which does not appear in the first paragraph, that the policy covers any loss which occurs within the policy period. Paragraph four was inserted for the purpose of making clear and unmistakable the extent of defendant's liability so far as the policy period was concerned. Had defendant intended that it should be held liable only in the event that not only the loss, but all things leading up to and rendering the loss possible, should have occurred within the policy period, it certainly would have so stated in paragraph four. Having attempted by that paragraph to state clearly the limitation of its liability so far as concerned the policy period, it would not have stopped until it had covered all contingencies.

Moreover, what reason could there be for requiring that the force and violence exerted and the visible marks made should have been within the policy period? The requirement that force and violence should be used and visible marks should be present was for evidential purposes only. What the defendant was insuring against was loss caused by burglary, in which force was a factor, and it was careful to exclude any notion that it insured against

mere theft, in which force played no part in causing the loss. It could make no difference to defendant whether the force and violence were used and the evidence thereof made before the policy period or during it. Those requirements were merely to furnish the evidence that the loss was caused by the thing insured against, burglary accompanied by force, and not by a thing not insured against, theft without force.

At any rate, under what rule of construction can the language used be turned into a provision that although loss occurs during the policy period there shall be no liability therefor if preparations for committing the burglary were made before it? Surely if defendant so desired to limit its liability, it would not have left the matter to conjecture but would have unmistakably stated the limitation in the policy. A considerable part of the policy is taken up with exclusions from liability. Tr., 10-12. The long list of exclusions shows that defendant understood the importance of stating definitely and clearly the exact limits of its liability, and of excluding by express provision any borderland case for which it did not intend to be bound. A corporation whose business is of the scope of defendant's, and possessing the experience that it has in writing burglary insurance, is certainly aware that when the taking of a large sum of money is planned, running, as this did, to over $20,000, many preparations are made before, and usually a considerable time

before, the actual taking. If it did not want to be held liable in a case where the preparations for a burglary antedated the policy period, it would have so provided in its exclusions. Furthermore, in this case defendant was dealing with an assured who was engaged in an unusual line of business. Each year, for the space of a week, it received large sums of money, for the protection of which it desired insurance. The surrounding circumstances were such that no successful burglary could be perpetrated unless preparations therefor were made before the beginning of the fair. That is proven by the situation as it is disclosed by the evidence here and by what the burglars actually did to make the burglary successful. Because the policy period was so short, it is evident that plaintiff did not want, and would not have taken, a policy insuring against burglary, but stipulating that there should be no liability unless it proved that all the preparations for the burglary, as well as the actual taking, occurred during the policy period.

Apart from any other consideration, to construe the policy as defendant requests would be to construe ambiguity in favor of the insurer and against the assured, and to extend the language of the policy to include what is not written, and is not necessarily implied, in order to exempt the insurer from liability. That would be flatly contradictory of the cardinal rule for the construction of insurance policies.

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company."

Thompson v. Phenix Ins. Co., 136 U. S., 287, 297.

"But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

National Bank v. Insurance Co., 95 U. S., 673, 678.

(6) *Steel shavings were not found until September 24th.*

Remembering that counsel are arguing that there was no evidence for the jury to consider, and that

therefore defendant's motion for a directed verdict should have been granted, the materiality of that fact is not apparent, and counsel do not enlighten concerning it. Of course the presence of those shavings, and the fact that they were not discovered before the burglary, nor for two weeks afterwards, were circumstances to be considered by the jury in determining whether plaintiff's or defendant's was the correct theory of the nature and manner of the burglary. But surely counsel would not be understood to say that the presence of the shavings was essential to plaintiff's case, and that, as matter of law, plaintiff cannot recover because the evidence shows (as counsel assume) that the shavings were not in the vault the morning after the burglary. That would be (to borrow a word from counsel) preposterous. At any rate, that claim is not made. Counsel have merely taken 10 to 12 pages of their brief to reproduce their argument to the jury that the shavings found on the 24th were "planted" after the burglary was committed. Assuming that the Court does not possess or desire to exercise the powers and functions of a jury, we shall not counter by reproducing the arguments by which the jury trying the case was convinced that counsel were in error. Evidently, it was for the jury to say whether minute steel particles, scattered around in a vault whose only light was afforded by an electric light, of unstated size, in the ceiling, were so conspicuous that it would be impossible to overlook them.

Instructions Given and Refused.

(1) The first complaint made under this head is that an erroneous construction was placed upon the policy sued on, in that the jury was instructed (in effect) that there could be a recovery although the force and violence used and the marks made upon the safe antedated the policy period. We discussed this subject under the preceding head, and do not desire to add anything to what is there said. The authorities cited by defendant under this head have not the remotest bearing upon the subject.

It is to be observed, however, that the jury was instructed that defendant could not be held liable unless the money was taken from the safe during the policy period; that while it would not defeat recovery if the plug was removed and the combination learned before the policy period began, there could be no recovery unless the money was taken during that period. Tr., 144.

(2) Next, complaint is made of the refusal to instruct that there could be no recovery if the safe was opened by manipulating the lock. In so far as the complaint goes to the construction of the policy, to the claim that there could be no recovery if force and violence and manipulation combined to effect an entrance, we regard our discussion of the subject under the preceding head as sufficient.

However, some finical criticisms are made which may be dignified with brief notice. It is said that

the jury was not instructed that there could be no recovery if the door was opened solely by manipulating the lock, and that while the jury was instructed that it was necessary to show force and violence in making an entry, nothing was said about visible marks, and the instruction was so worded that the force and violence referred to might have been understood as that employed to effect an entry through the grandstand, or into the auditor's room, or to what was done to the vault door. Regard for counsel's good faith requires the inference that they did not hear or read the instructions given, else they would not have made such claims. The jury was told that the safe, not the vault, was the thing covered by the policy, and that "the actual force and violence provided by the policy has reference to effecting an entry into the safe as contradistinguished from the vault." Tr., 142. Also that it was necessary that the loss should be one occasioned by burglary, by "abstracting money from the interior of the safe in question by a person or persons making felonious entry into such safe by actual force and violence, of which force and violence there shall be visible marks made upon the safe by tools." Tr., 143. There were other instructions relating to the drilling of the original hole, its plugging, and what would be necessary with respect to its removal to constitute force and violence within the meaning of the policy. Tr., 143-145. This followed:

> "The sole force and violence which you will consider is the force and violence, if any, em-

ployed in drilling out or drawing out the plug from the hole in the safe door, if you find from the evidence that the hole had been closed as already stated, and that such plug was drilled or drawn out, and the only visible mark showing the use of tools which you can consider is the hole in the safe door made by drilling out or extracting the plug in question if you find such hole was so made.

"On the contrary, I charge you that if entrance to the safe was effected without the employment of actual force or violence, but by means of working or manipulating the combination on the door of the safe, and the person so working or manipulating such combination without force or violence was enable to gain access to the interior of the safe and thereby steal and carry away its contents, such an entrance is not within the terms of the policy in suit, and the defendant company is not liable therefor.

"I further charge you that the burden of proof in this case rests upon the plaintiff to establish that at the time and upon the occasion in question the safe was burglariously entered by some person or persons, and that such felonious entry into the safe was effected by actual force and violence, of which force and violence there must be visible marks made upon such safe by tools, and that by means of the entry so effected the money in question was abstracted from the safe." Tr., 145-146.

(3) Refusal to instruct that there could be no recovery unless the jury found that the plug was removed by the burglar is next complained of. Reference to the instructions given, especially those appearing on pages 143 to 146 of the transcript, shows

that the subject matter of the requested instruction was dealt with from every viewpoint suggested by the evidence, and in such a manner that the jury could not misunderstand what it was required to find with regard to the removal of the plug to warrant a verdict for plaintiff.

There is no error, and the judgment should be affirmed.

Respectfully submitted,

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Plaintiff in Error,

vs.

SPOKANE INTERSTATE FAIR ASSOCIATION,
Defendant in Error.

No. 4639

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division

REPLY BRIEF OF PLAINTIFF IN ERROR

JAS. A. WILLIAMS,
E. A. CORNELIUS,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division

REPLY BRIEF OF PLAINTIFF IN ERROR

JAS. A. WILLIAMS,
E. A. CORNELIUS,
Attorneys for Plaintiff in Error.

The plans made, and the methods adopted, by the robber for the purpose of obtaining the money and removing same, without detection, is of no importance to a decision of this case, except that it establishes that, the preparations were made long prior to the policy period, which fact is admitted in Defendant in Error's brief. Such prior preparations throw no light, whatsoever, upon the material question, whether there is evidence sufficient to make a *prima facie* case that entrance to the safe, the subject of the insurance, was effected "by actual force and violence of which force and violence there shall be visible marks upon such safe or vault by tools, explosives, chemicals or electricity," except, to a certain extent, to negative that there was such force and violence. However the robbery may have been accomplished, these preparations were necessary.

Defendant in Error intimates that since Plaintiff in Error did not challenge the sufficiency of the evidence, until after all evidence had been presented, that it conceded that Defendant in Error had made a *prima facie* case. Not so. A challenge to the evidence, when Defendant in Error rested would, under the law, have had to be considered in the light of the record as it appeared, after all the evidence had been presented. Plaintiff in Error desired before presenting the challenge, that its affirmative evidence showing that the steel shavings

were not present at the time the robbery was discovered, should be before the court. The failure to make the challenge when Defendant in Error's rested, was due solely to this.

It is suggested that the transcript bears upon its face evidence that the testimony was either badly reported or badly abstracted. The bill of exceptions was settled after service thereof on Defendant in Error. Amendments were proposed by Defendant in Error to the bill. (Tr. 151.) If the bill did not correctly show the testimony, it is now too late for Defendant in Error to complain. However, it does show the testimony, but there is an error in the printed transcript at page 120. This is no fault of ours, but is the error of the printer. Since the mistake is not, in any sense, that of Plaintiff in Error, we fell we are justified in calling attention to the correct language, which is as follows:

> "I think the dust would have settled below the surface that he would have touched with his fingers. I have never examined this tray since for finger prints. I couldn't tell whether it would be full of finger prints unless I would make a careful examination. The probability is pretty good for finger prints."

Defendant in Error says (brief 7) "the safe door, lock plug and dial rim were not disturbed from that time until the time of the burglary involved in this case." There is not a particle of evidence to

sustain this statement. It is stated (brief 9) that "one could pass at night as many times as one pleased out to the race track, the shrubbery, and through the fence by gates or loose boards, without fear of detection." This is not a correct statement. There were, during that time, numerous fair employees and watchmen all over the grounds during all hours of the night. By care and good luck one might have removed the money in that way without detection. A suggestion (brief 12) "that the vault door was sprung" is somewhat misleading. This was not a discovery made at that time, since the vault door had been in that condition a long time. The statement (brief 14) that the steel shavings were discovered due to a flashlight being turned upon them, is not accurate. These steel shavings were first discovered by Chief of Police Turner and Officer Hudson, while they were standing several feet away, and there was no flashlight being used at the time they made the discovery. The suggestion (brief 14) that "a skilled yeggman (probably there were two or three on the job)" planned and consummated the robbery, is purely a speculation. There was nothing about the affair that at all indicated that there was a skilled yeggman connected with it. The preparation of the hole in the grandstand and in the auditor's room, the oil and adhesive tape, and the removal of the screw in the vault door present no evidence pointing to a "skilled yeggman." These were things that would have been done by any reasonably intelli-

gent person, who was intending to rob the safe at the time in question. The statement (brief 18) that the vault door combination "could be easily picked by an expert, who ought to get it in an hour's time easily" is not supported by the record. Evidence to this effect was received based upon an erroneous assumption of facts, namely, that the combination was set on numbers of 5, 10 or multiples thereof. It developed later that the assumption was not founded on the facts (Tr. 100, 101, 102, 103) and this evidence was withdrawn from the jury. (Tr. 103.) The quotation from the bill of exceptions (brief 20) was from an earlier part of the testimony of the witness Corey. He later admitted that there was no evidence that the plug had been drilled out, nor that the hole was not true. He testified that the hole showed no evidence of a second drill having gone through.

I.

Defendant in Error (brief 21) italicized what it claims is Plaintiff in Error's theory as follows: "(1) The evidence is as consistent with the theory that the safe was entered without force and violence as it is with the theory that force and violence were employed. When the evidence presents two theories, upon one of which the Defendant would be liable, and upon the other he would not, there can be no recovery, for the jury will not be permitted to adopt one theory rather than the other." Plaintiff in Er-

ror has advanced no such argument, nor is that its theory. The contention made in the opening brief was that there were no circumstances proven, which would legally permit an inference to be drawn that entrance was effected by actual force and violence, nor that there were any visible marks made upon the safe by the one so entering; that in fact, all of the circumstances proven, negatived that any such entry was made; that to permit the case to go to the jury, and to return a verdict favorable to Defendant in Error, was to permit a recovery based solely upon guess, speculation and surmise without anything whatever appearing, which would lead to that result.

There is not, in this case, any evidence, which would permit an inference that entrance was effected in a manner so as to create a liability under the policy. As stated in the opening brief, at page 24, there were no circumstances proven, which bore upon this point, except that the hole was drilled by Larson in August, 1922, and a tapered steel plug inserted, and that the plug was not in the hole nineteen days after the robbery.

It is not necessary that Plaintiff in Error should formulate any theory as to who took the money, nor as to the details connected with its taking. The burden of proof is on Defendant in Error, and it is required to present evidence, which will make a

prima facie case of a right to recover. There is no burden on Plaintiff in Error to explain the disappearance of the plug, nor the presence of the shavings. The burden is with Defendant in Error, and must continue with it. Nor is there anything in the transcript as to the standing of the officers of the Fair Association, nor the different employees, which is discussed at page 22, nor is it true that the ones who scattered the steel shavings subsequent to the discovery of the robbery, committed a crime. They could scatter the shavings as they chose, or they could remove the steel plug, and would be guilty of no offense whatsoever. If they did these things for the purpose of making a case against Plaintiff in Error, their act was dishonest, but not criminal.

Whatever the correct rule is as to the probative force of circumstances to sustain a necessary inference—and the courts have expressed themselves differently on the subject—yet all agree that the circumstances must be of such a nature as to reasonably justify the inference sought to be drawn; that verdicts cannot be tolerated, where the only foundation to sustain them is guess, speculation, surmise and conjecture; that the possibility that a thing may have occurred in a certain way is not sufficient.

The case of Travelers Insurance Company v. McConkey, 127 U. S. 661 (32 L. Ed. 308) which Defendant in Error says is on all fours with the case at bar, does not even remotely bear upon the ques-

tion. All that case decides is that in a suit on an accident insurance policy, there is a presumption against suicide and against murder, and that where the policy provides for direct and positive proof that the death was accidental, that this was supplied by the proven fact that the death was the result of a pistol shot, and the presumption against suicide and murder. The quotation from this case, at page 29, simply was to the point that, notwithstanding the presumption against suicide and murder, that there was such evidence to justify an inference that the death was due to either suicide or murder.

The case of U. S. F. & G. Co. v. Blum, 270 Fed. 946, is of a similar nature. Plaintiff in Error has never disputed that a case may be made by circumstantial evidence, and that the circumstances may be of such a nature as to justify an inference necessary to establish a material fact, but it does not follow from this that a fact may be found from circumstances, which do not justify the inference required. No court will permit a recovery where the inference sought to be drawn is one of pure guess and speculation. Fidelity & Casualty Co. v. Bank, 142 Pac. (Okla.) 312, cited by Defendant in Error, clearly shows the distinction. In that case, the door was closed and locked with a time lock. There was evidence so closed, the safe could not be opened in any manner, except by the use of tools and explosives, before the time lock had run to a point

permitting it to open; that there were scratches or marks on the knob or dial of the safe, and that the safe could be opened by the use of blows from a heavy instrument. There was here, therefore, proof that the safe could not be opened at the time when the loss occurred by the use of the combination, or in any other method, except by force, and there were visible marks on the safe, and there was evidence that the safe could be opened by blows when the time lock was on. In other words there was evidence that the safe could only be opened by force and violence at the time in question, the further fact that during this time it was opened, and there were present visible marks.

Defendant in Error says (brief 33) "Any argument here must be based upon mutilated evidence; mutilated by passing through the understanding and the reproduction of court reporter, abstractor and printer." Again we suggest that the bill of exceptions has been settled by the District Judge, who certifies, "that said bill of exceptions conforms to the truth, and contains all the matters and facts material in the proceedings heretofore occuring in the cause and not already a part of the record therein and necessary for the review of this cause by the Circuit Court of Appeals." The certificate further shows that amendments were proposed by Defendant in Error. Plaintiff in Error has brought the record to this court in the proper

way, to have the questions under discussion reviewed. It must be accepted that the bill of exceptions contains all that it should and presents the question properly before this court. Defendant in Error cannot escape the force of the record by a suggestion that possibly there was other evidence. There was no other evidence. The question is before this court as clearly and fully as before the lower court. The difficulty with Defendant in Error is the weakness of its case. As admitted above, the official printer has omitted a few immaterial words at page 120 of the transcript. The transcript, as certified by the clerk of the District Court, is on file with the clerk of this court, and the error of the printer appears. Plaintiff in Error had no control over the printing of the transcript.

It is suggested (brief 36 and 37) that there were more shavings about the safe on the 24th than the morning after the burglary, since Corey testified that some shavings fell out from the dial rim when he removed it. We have dealt with this fully in the opening brief. Corey's testimony shows most conclusively that there could be no shavings under this dial rim, as the result of a previous boring of the hole, or of the plug, unless they were placed there after the new dial rim was obtained and put in place. Nor could they be lodged in the drilled hole, since after the plug was drilled into and then pulled out, no shavings from the drilling would get

into the hole, and if any shavings, under any conditions, got into the drilled hole, the court will notice by examination that this drilled hole is bored on an angle downward. It is not necessary that we should prove how these shavings came to be placed around the safe after the robbery, and before September 24th. The fact remains that they were. Nor is there any burden on Plaintiff in Error to establish why they were placed there, or by whom. The material fact is that they were not present on the morning of September 5th.

Defendant in Error states (brief 42) that there are but two inferences, which can be drawn. (1) That the burglary was committed by a skillful yeggman, and that he drilled out the plug which Larson had put in, and in that manner learned the combination. (2) That the burglary was committed by officers or employees of Plaintiff, who knew the combination of the safe. Neither statement is accurate. If the robbery was committed by a yeggman, it would not follow in any sense that such a yeggman learned the combination through the drilled hole. In fact there would be nothing suggesting that it was learned in that manner. We have dealt with this fully in the opening brief. Nor is it a fact that if the burglary was not committed by a yeggman, that it was committed by officers or employees of Defendant in Error. Given the knowledge of the combination of the vault and the safe,

any fairly intelligent person, who desired to take the risk, could have accomplished the act just as effectively as it was done. Anyone with any intelligence knew that a means of getting into the auditor's office would have to be devised, so as to avoid detection. There was nothing in the carpenter work or other things done, that pointed to an expert yeggman. They were simply the things that were necessary, if there was to be any hope of avoiding discovery. One thing alone was essential, and that was that the one, who entered through these doors, which had been cut, and went into the vault, on the night of September 4th, should know that the preparation, which had been made, had not been discovered. Whether this was someone connected with the Fair Association, a professional yeggman or an ordinary individual, he would have been crazy to have made the entrance without knowing that the preparations made by him had not been discovered.

It is suggested (brief 44) that an acceptance of our theory "entails acceptance of the idea that some officer or employee of the fair, who knew the combination of the safe door, unlocked it." This does not follow at all. The transcript discloses that there were at least eight people, who knew the combination. The extent to which these eight people had communicated the combination is not known. To what extent, if at all, the combination may have been learned through someone getting knowledge

thereof, when the safe door was left open by Larson or by others, or through watching the combination worked, or otherwise, is not known. Suffice to say, that the one, who took the money knew the combination of the vault door, and entered the vault through the manipulation of the combination on that door, and did likewise in the case of the safe door. There is no pretense that knowledge of the combination of the vault door was obtained through any force or violence. Again we repeat there is no burden on Plaintiff in Error to place the blame for this robbery, nor are we attempting to do so, nor are we attempting to accuse anyone. Plaintiff in Error is standing squarely upon the proposition that a *prima facie* case has not been made, warranting a recovery on the policy. The burden to make a *prima facie* case was Defendant in Error's. Plaintiff in Error does, it is true, have some opinions on these different points, but it is neither necessary, nor would it be proper to express them.

II.

The suggestion (brief 46) that the purpose, of the provision in the policy that there should be visible marks of force and violence was "to restrict liability to burglary," is not sound. There are other most important reasons why the requirement of visible marks of force and violence is most important to the insurer. We will discuss this more fully later.

III.

Some suggestion is made (brief 48) as to the request made by Defendant in Error for the policy of insurance. There is no claim that the policy is not the one agreed upon between the parties, and the policy in suit was the only one, which Plaintiff in Error agreed to write, or did write, so far as appears from the transcript. The coverage apparently satisfied Defendant in Error, since it was accepted, and is the one sued on here.

IV.

Under this point (brief 48) Defendant in Error suggests that the fact that entrance was effected to the safe by the manipulation of the combination is of no importance, if knowledge of the combination had been obtained by force and violence, and that the force and violence was the proximate cause. This case does not involve any question of proximate cause, and if it did, the authorities cited would be against Defendant in Error, since they would tend to show that the alleged burglary antedated the policy period. The question here involved is the determination of the rights of the parties under a written contract. By such contract, (the policy of insurance) liability only accrued if entrance was effected to the safe by actual force and violence of which there should be visible marks thereof upon the safe made by tools, explosives, chemicals or

electricity. By the subsequent provision, that a liability should not exist if entrance was effected by opening the door of the safe, by the manipulation of any lock.

The insurer was relieved absolutely from liability if entrance was effected in that manner. There is nothing ambiguous or uncertain about the contract. Simpler language could not have been well employed. Its meaning is perfectly clear. First, there could be no liability, unless the force and violence were used. Second, irrespective of whether force or violence was used, there would be no liability, if the door was opened through manipulation of the combination lock. There might have been all manners of force and violence used, and all manner of visible marks evidencing such force and violence, but if the final act of opening the safe door was effected through the manipulation of the combination lock, under the plain words of the contract, there is no liability.

Defendant in Error says (brief 52): "By one part of the policy, Defendant is made liable if entry is effected by force and violence. By another part Defendant is exempted from liability if the safe was entered by manipulation of the lock. Which provision governs when, as here, both manipulation and force and violence have played a part in effecting the entrance." The answer is perfectly obvious.

Notwithstanding the force and violence, if any were used, nevertheless, in the final analysis entrance was effected by the manipulation of the combination lock, and as plainly as words can express it, the policy prohibits a recovery.

It is suggested (brief 53 and 54) that the sole purpose of the provision against liability where entrance was effected by manipulation of the lock, was to avoid liability caused by mere thievery. This is not, in any sense, correct, and the suggestion will be further discussed under the next head.

V.

ANY FORCE AND VIOLENCE EXERTED UPON THE SAFE AND ANY VISIBLE MARKS THEREON, WERE EXERTED AND MADE PRIOR TO THE POLICY PERIOD.

This point, if the lower court's construction of the policy, was erroneous, is absolutely decisive of this case, and it must follow that Defendant in Error has no right of action whatsoever. Defendant in Error, in its brief at several places, has conceded what is undoubtedly the fact, that if there was any force or any visible marks made on the safe, it was at a time prior to the policy period. If the lower court's construction of the policy was erroneous, then judgment should have been ordered in favor of Plaintiff in Error.

Defendant in Error first concedes that possibly if the first clause of the policy stood alone, the construction adopted by the lower court, was erroneous. So "at least there is nothing in that paragraph which expressly negates the idea that to warrant recovery it is necessary to show that the loss and everything leading up to it occurred during the policy period." It then proceeds to refer to the fourth paragraph, and suggests that by that paragraph "that idea is negated, and it is clearly expressed that to establish a right to recover it need only be shown that loss occurred during the policy period." Defendant in Error's argument on this point is certainly obscure. A very erroneous construction is made of that paragraph. That paragraph does not say that the policy "covers any loss, which occurs during the policy period," nor is there language in the paragraph which would, under any possible construction, lead to that conclusion. We italicized in the opening brief the word "aforesaid" appearing in this paragraph 4, and we called attention to what was referred to when the words "loss" and "damage" were used. Defendant in Error has not seen fit to notice these material words in the policy. To repeat, the first paragraph of the policy relates to "loss by burglary." The second paragraph of the policy is "to indemnify the insured for all damage (except by fire) to such safe or vault, and to the property contained therein." Therefore, in paragraph 4, when the word "loss" is used, it refers to

the loss described in the first paragraph of the policy, and where the word "damage" is used, it refers to the coverage in the second paragraph of the policy. The language of this paragraph reads, "This agreement shall apply only to loss or damage *as aforesaid* occurring within the policy period defined in Item 4." Item 4 describes the policy period as commencing August 31, 1924 at noon. If words could be employed to express more clearly the intention that the "loss" as defined in paragraph 1 must occur within the policy period, we do not know how it would be done without employing many useless words. Loss as defined in paragraph 1 consists of the abstraction of the money from the safe by actual force and violence of which force and violence there should be certain marks. There was not a "loss" within the language of the policy, until these things were done, and that loss under paragraph 4, must have occurred within the policy period. The use of the words "as aforesaid" in paragraph 4, refers back to paragraph 1, and makes the construction for which we contend, unquestionably correct. It would be most unreasonable to assume that either the insurer or the insured intended that there should be any coverage of any nature or kind antedating the policy period.

Defendant in Error (brief 48) complains that "a considerable part of the policy is taken up with the exclusion of liability." This is hardly a fair

statement, since we think this policy is unusually plain in its language. Nevertheless, however, Defendant in Error is in one breath criticizing the policy as employing too many words, and in the next is objecting because additional words have not been employed. There should be a possibility that an insurance company could employ words to limit its liability to the extent, which, the premium paid, would justify the risk, and there is no occasion in this case of reading into the policy something that is not there, and ignoring the plain provisions, and of giving to the insured something that was not within its contemplation when the policy was written.

Defendant in Error (brief 60) suggests that there was no reason for requiring that the force and violence exerted, and the visible marks made, should have been within the policy period; that such requirements were only for evidential purposes. Similar suggestions have been made at previous places in Defendant in Error's brief. It is not true that the purpose of these provisions was for "evidential purposes only." A very much greater reason existed for such provisions. They were of the utmost importance for the purpose of limiting the liability. Plaintiff in Error had assumed a liability of $25,000, for the practically nominal consideration of $28.75. For such a consideration necessarily its liability must be decidedly limited. By the policy the money was to be kept in the safe, and its loss must have

occurred after the safe was closed and locked. As further protection to the insurer, it was required that a private watchman should be employed on the premises at all times, when the same were not regularly open for business. The importance of this provision was to reduce the danger of loss. The taking of money from a safe, where the thief can stealthily enter the place, where the safe is located, and quietly turn the combination, and open the safe door, take the money and depart, is decidedly a different condition from one where in order to render the policy liable, the thief must enter, and by the use of tools, explosives, chemicals or electricity force an entrance into the safe, obtain the money and depart. In the one case his movements are practically noiseless, and the money is acquired, and he is gone in a comparatively short time. In the other case, the explosion and use of the tools, makes a great noise, and instead of being but a comparatively short time at his task, he probably occupies hours. The watchman constantly on duty, and the other employees in and around the office, and the fair grounds, might fail to discover the attempted burglary, where the entrance was effected by the combination route, but there would be scarcely a possibility that the entrance could have been effected by force and violence and by the use of tools, explosives, chemicals and electricity without the noise having been heard, which would lead to discovery with the result that the money would not have been lost, and the added

time taken would greatly have increased the probability that the robber would be discovered. The auditor's room was brilliantly illuminated, and watchmen were going back into the auditor's room to the lavatory all through the night (Tr. 66). It was of the utmost importance to the insurer, for the purpose of decreasing its liability, that these things should occur within the policy period. It was of no protection to the insurer that the entrance should be effected by force and violence, if this force and violence might occur prior to the policy period. Such force and violence would not be discovered or noticed, and in any event it would be of no benefit as to a liability thereafter assumed by the insurer. Defendant in Error suggests that "the surrounding circumstances were such that no successful burglary could be perpetrated, unless preparation therefor were made before the beginning of the fair." If this were true, this was of the utmost importance to the insurer. It would be justified, for the small premium, in assuming the very large liability due to such situation, if its liability was limited as provided by the policy.

That such a policy as this is not construed, so as to create a liability for thievery, or by entering with the combination, where such combination has been obtained by force or violence, such as forcibly taking it away from the one having the combination, or compelling such person to open the safe, or to com-

municate the combination, is decided by the following cases:

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Rosenthal v. American Bonding Co., 100 N. E. (N. Y.) 716 (46 L. R. A. N. S. 561);

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. S. 309.

The evidence was insufficient to permit a recovery, and for the other reasons given, judgment should be ordered in favor of Plaintiff in Error.

JAS. A. WILLIAMS,

E. A. CORNELIUS,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

Petition for Rehearing

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Spokane, Washington
Attorneys for Defendant in Error.

EMPIRE PRINTING CO., SPOKANE

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

---

Petition for Rehearing

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Spokane, Washington
Attorneys for Defendant in Error.

Defendant in Error petitions the Court for a rehearing upon the question of law decided; if this should be denied, alternatively it prays a modification of the opinion.

1. The Court will take judicial notice that most country banks and most other safe owners carry burglary insurance. This insurance is written for a year. It is sometimes renewed, as seems to be contemplated by the policy in suit in this case, by a certificate of renewal, thus making the policy in force for another period. More often it is done, however, by the issuance of a new policy. Suppose a safe owner had carried with the Plaintiff in Error burglary insurance, under a policy identical in its terms with the one in suit, for the year 1924, terminating at midnight on December 31st of that year; that either a new policy was written commencing at the moment of the expiration of the old and covering another year or that a new contract had been made by the issuance of a certificate of renewal. In both cases the legal effect would be identical; that is, one contract expiring at midnight on December 31st and the other commencing at that same moment. Now suppose further that it were established in a suit against Plaintiff in Error for a loss by burglary that the burglar had drilled the safe during the night of December 31st, completely finishing the drilling before midnight, and that after midnight he had extracted the contents of the safe. Under the doctrine declared by the opinion

in this case the safe owner would be remediless. He could not recover under the 1924 policy because there had been no loss during the life of that policy; he could not recover under the 1925 policy because the force and violence applied to the safe and the consequent visible marks thereon were exerted before midnight, before the 1925 policy was in effect. We put this question to the Court: In such a state of facts would not the Court, looking at the language of the policy, say there was at least reasonable doubt whether the parties to the two contracts intended, or did not intend, that the insured should be protected in such a contingency? We say the law is that if there were reasonable doubt upon the question, that doubt must be resolved in favor of the insured. It is true the opinion in this case recognizes the rule. We respectfully submit, however, that it does not make a just application of the rule. We ask the Court to consider the case of *Mutual Insurance Co. v. Hurni Co.,* 263 U. S., 167. In that case a policy was actually issued in September. It was antedated to August of the same year. The question before the court was the two years incontestability clause. The words to be construed were "from its date of issue." The Court say (p. 175):

> "While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual

> execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself."

and at page 176 the Court say again:

> "It was within the power of the Insurance Company if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it."

Now in the case we have supposed, the Court would turn to the language of the two policies, the one of 1924 and the one for 1925, and would there find written in paragraph four under the head of "Limits of Indemnity" this language: "This agreement shall only apply to loss or damage as aforesaid occurring within the policy period. * * *." May it not justly be said that that language, by its very terms, excludes the application of the force and violence within the policy period? Mark you, the attention of the writer of the policy, in paragraph four, under the head of "Limits of Indemnity," is drawn to the very question. He there undertakes to state precisely what must occur within the policy period. He says the *loss* must occur; not that the force and violence must have been applied, not that the visible marks must have been left within the policy period, but, in express terms, that the *loss* must have occurred within that period, thereby of necessity excluding everything else. At the very least, it seems to us, the Court, upon further con-

sideration, must say that those words leave the question as to what is meant open, in the language of the case from the Supreme Court above cited, to "reasonable doubt." It seems to us too plain for argument that, in the language of the same Court, "it was within the power of the Insurance Company, if it meant otherwise, to say so in plain terms"; and the conclusion follows in this case, as it followed in that, that "not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it." We have put the suppositious case to bring strikingly to the forefront the evil which would result from the ruling in this case. In the supposed case, it seems clear to a demonstration that the insurance company did not intend and the insured did not suppose he was taking a policy, and then another, and that notwithstanding he was still uncovered for a loss coming plainly within the terms of one or the other.

In the case we have imagined, the burglary is admitted, the loss is admitted, and yet the insured is deprived of the protection which he supposed he had and which presumably the Insurance Company intended to give him. By the construction of the policy following the opinion in this case, the insured fell between the horns of the altar, between the 1924 and the 1925 policy. So here. It is not disputed that the safe was burglarized; it is not

disputed that its contents were abstracted; the amount is not in dispute. Every single element is present in substance that under the terms of the policy was necessary to be present to entitle the insured to a recovery. The safe had been entered by violence; the marks of violence are upon the door. Pray, how does it stand with justice and the rule of construction that we are contending for to say, forsooth, that because violence was applied days, or hours, or minutes, or seconds, before the period of the life of the policy, that therefore, and for that reason only, the insured cannot recover? We do respectfully urge upon the Court that it permit a reargument of this question to the end that it may have further consideration.

2. If the foregoing petition be denied, we then pray the Court to modify the language of the opinion. It is stated in the opinion that it was at no time claimed that the safe was opened or entered by actual force and violence during the policy period. In this statement the Court is in error as a mere matter of record. Paragraph four of the complaint alleges that (p. 3, Tr.) during the night of September 4, 1924, or early morning hours of September 5, an entry was made and the burglary completed. The same paragraph then alleges that such entry was effected into the vault and safe by actual force and violence, etc. Plainly, the complaint alleges the entry and the force of violence to have been made during the night of September

4-5. There is not a word, a line, or a syllable in the evidence in the case tending to depart from that allegation of the complaint. The opinion, then, goes on to say that the case was tried and submitted to the jury upon the theory that some time before the opening of the fair and the date of the policy the force and violence were applied, and the actual entry was thereafter made. The writer of this petition tried the case below. He is quite in a position to say that at no time up until the court charged the jury was the case tried upon the theory suggested by the opinion. The evidence of the facts as claimed by plaintiff was introduced. Defendant impliedly conceded the sufficiency of that evidence to make a case because he did not challenge its sufficiency, but after plaintiff had rested went at once to his own testimony. When the evidence was all in, the defendant challenged its sufficiency and plaintiff moved to take from the consideration of the jury certain affirmative defenses pleaded by defendant. Defendant's motion was overruled and plaintiff's motions were granted. Up to this stage of the case, plaintiff was prepared to go to the jury upon the question that the force and violence was applied and the consequent marks made during the policy period. Of course there was no direct evidence upon the question. No one saw or pretended to have seen any part of the burglary. It was a matter of inference from the evidence in the case which the jury, and the jury alone, were competent to draw. There were many powerful and cogent

reasons to suppose that the safe was drilled during the life of the policy, and counsel are prepared, if necessary, now to go to the jury upon that question. It is not necessary, we suppose, to state those reasons in this petition. We do not know that on the future trial of this case the statements of the opinion to which we have referred would bind either the lower court or the plaintiff, or, in the event of another appeal, the appellate court. Indeed, the rule is well established by the authorities that no ruling made by the appellate court upon a question of fact binds the trial court or the appellate court itself on a second trial and a second appeal. This upon the theory that the case, when reversed, is tried at large; that the jury on the second trial may take the same view of the evidence that the jury upon the first trial took, or it may take a totally different one. So, likewise, may the trial court and the appellate court. We refer to one or two cases: Williams et al. v. Miles et al. (Neb.), 127 N. W., 905; Wallace et al. v. Sisson et al. (Calif.), 45 Pac., 1000; Northern Assurance Co. v. Grand View Ins. Ass'n., 203 U. S., 106. And we suppose likewise that if upon the first trial the plaintiff had taken the view of the evidence imputed to it by this opinion it would still be open to its counsel to take a different view of the evidence and to urge the second view upon the second jury. The trial court might, however, feel itself bound by the declarations of the opinion and might conceivably feel compelled to give them some effect. We

think that the language of the opinion in these respects should be modified. It is true, as the opinion states, that it was admitted on the argument before this Court that the force and violence were employed before the date of the insurance policy. Well, now, when the court charged the jury that it was immaterial whether the force and violence were employed before or after the date of the policy, all questions as to when that force and violence were used ceased to be material. From that time on the plaintiff was concerned only with the questions that force and violence were employed and that entry into the safe was effected and the money abstracted during the life of the policy. But to say that when the court took that view of the law, upon our motion of course, that the whole case had been from the beginning tried upon that theory, is quite to mistake the effect of the record. And of course when counsel, arguing in this court, made the concession stated in the opinion he made it because it was immaterial to this hearing when the force and violence was actually applied. The jury had not been invited to pass upon that question. To sustain the judgment it was necessary to sustain the view of the law taken by the trial court, and therefore counsel, without quibble, admitted the facts to be so. But assuredly, your Honors, it was not necessary that counsel should say, in making this admission, "We make it for the purpose of the record as it now stands, and not otherwise." Assuredly, your

Honors, this is implied in the very circumstance of the case as it stood when argued in this Court.

Respectfully submitted,

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Attorneys for Defendant in Error.

We hereby certify that in our judgment the above petition for rehearing is well founded, and that it is not introduced for delay.

RANDALL & DANSKIN,
GRAVES, KIZER & GRAVES,
Attorneys for Defendant in Error.